No. 06-1005
Title: United States, Petitioner
v.
Efrain Santos and Benedicto Diaz
Docketed: January 23, 2007
Lower Ct: United States Court of Appeals for the Seventh Circuit
Case Nos.: (04-4221, 05-2316)
Decision Date: August 25, 2006
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Nov 9 2006	Application (06A486) to extend the time to file a petition for a writ of certiorari from November 23, 2006 to December 23, 2006, submitted to Justice Stevens.
Nov 13 2006	Application (06A486) granted by Justice Stevens extending the time to file until December 23, 2006.
Dec 13 2006	Application (06A486) to extend further the time from December 23, 2006 to January 22, 2007, submitted to Justice Stevens.
Dec 14 2006	Application (06A486) granted by Justice Stevens extending the time to file until January 22, 2007.
Jan 22 2007	Petition for a writ of certiorari filed. (Response due February 22, 2007)
Feb 9 2007	Order extending time to file response to petition to and including March 26, 2006, for all respondents.
Mar 26 2007	Brief of respondent Benedicto Diaz in opposition filed.
Mar 26 2007	Brief of respondent Efrain Santos in opposition filed.
Apr 4 2007	DISTRIBUTED for Conference of April 20, 2007.
Apr 4 2007	Reply of petitioner United States filed. (Distributed).
Apr 23 2007	Petition GRANTED.
May 25 2007	Motion to dispense with printing the joint appendix filed by petitioner United States.
Jun 7 2007	Brief of petitioner United States filed.
Jun 11 2007	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Jun 20 2007	The time to file respondents' briefs on the merits is extended to and including August 13, 2007.
Aug 7 2007	The time to file respondents' brief on the merits is further extended to and including August 20, 2007.
Aug 8 2007	CIRCULATED.
Aug 9 2007	Record received from U.S.C.A. for Seventh Circuit. (1 envelope)
Aug 14 2007	SET FOR ARGUMENT Wednesday, October 3, 2007.
Aug 17 2007	The time to file respondents' brief on the merits is further extended to August 22, 2007.
Aug 17 2007	Record received from U.S.D.C. for Northern District of Indiana. (2 boxes)
Aug 20 2007	Brief of respondent Benedicto Diaz filed. (Distributed)
Aug 20 2007	Brief of respondent Efrain Santos filed. (Distributed)
Aug 22 2007	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Sep 21 2007	Reply of petitioner United States filed. (Distributed)

Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

EFRAIN SANTOS AND BENEDICTO DIAZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The principal federal money laundering statute, 18 U.S.C. 1956(a)(1), makes it a crime to engage in a financial transaction using the "proceeds" of certain specified unlawful activities with the intent to promote those activities or to conceal the proceeds. The question presented is whether "proceeds" means the gross receipts from the unlawful activities or only the profits, *i.e.*, gross receipts less expenses.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 461 F.3d 886. The opinion of the district court granting in part respondent Santos's motion for collateral relief (App., *infra*, 17a-50a) is reported at 342 F. Supp. 2d 781. The opinion of the district court granting in part respondent Diaz's motion for collateral relief (App., *infra*, 51a-79a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 2006. On November 13, 2006, Justice

Stevens extended the time within which to file a petition for a writ of certiorari to and including December 23, 2006. On December 14, 2006, Justice Stevens further extended the time within which to file a petition to and including January 22, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this petition. App., *infra*, 81a-86a.

STATEMENT

This case involves a question about the scope of the principal federal money laundering statute, 18 U.S.C. 1956(a)(1), on which the courts of appeals are divided. After a jury trial in the United States District Court for the Northern District of Indiana, respondent Santos was convicted of conspiring to conduct an illegal gambling business, in violation of 18 U.S.C. 371; conducting an illegal gambling business, in violation of 18 U.S.C. 1955; conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h); and money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i). After a plea of guilty, respondent Diaz was convicted of conspiracy to commit money laundering, in violation of Section 1956(h). The court of appeals affirmed respondents' convictions. *United States* v. *Febus*, 218 F.3d 784 (7th Cir.), cert. denied, 531 U.S. 1021 (2000). Thereafter, respondents filed motions for collateral relief under 28 U.S.C. 2255, and the district court vacated their money laundering convictions. The government appealed, and the court of appeals affirmed the district court's judgments. App., *infra*, 1a-16a.

> 1. Section 1956(a)(1) makes it a crime when anyone, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or * * *
>
> (B) knowing that the transaction is designed in whole or in part—
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.

18 U.S.C. 1956(a)(1).

Section 1956 defines "specified unlawful activity" to include, among a variety of other offenses, the racketeering crimes enumerated in 18 U.S.C. 1961(1) (Supp. IV 2004). See 18 U.S.C. 1956(c)(7)(A). The racketeering offenses listed in Section 1961(1) in turn include the running of an illegal gambling business, in violation of 18 U.S.C. 1955. See 18 U.S.C. 1961(1) (Supp. IV 2004).

2. From the 1970s through the 1990s, Santos operated an illegal lottery, known as a bolita, in northwest Indiana. Gamblers placed bets with the bolita's runners, primarily at restaurants and taverns. The runners delivered the wagers to the bolita's collectors, who then gave the money to Santos. Santos paid the runners, the collectors, and the bolita's winners out of the total amount collected. Diaz was a collector in the operation. App., *infra*, 2a.

Based on that conduct, Santos was convicted, after a jury trial, of running an illegal gambling business, in

violation of 18 U.S.C. 1955, conspiracy to commit that offense, in violation of 18 U.S.C. 371, promotional money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i), and conspiracy to commit that offense, in violation of 18 U.S.C. 1956(h). App., *infra*, 2a-3a. Diaz was convicted, after a guilty plea, of conspiracy to commit money laundering, in violation of Section 1956(h). App., *infra*, 3a. The money laundering charges against Santos were premised on his payments to the bolita's couriers and winners. The charge against Diaz was based on his receipt of payment for his collection services. *Id.* at 6a.

Santos was sentenced to concurrent terms of 60 months of imprisonment for the illegal gambling convictions and 210 months of imprisonment for the money laundering convictions. Diaz was sentenced to 108 months of imprisonment. App., *infra*, 3a.

3. On direct appeal, Santos challenged his money laundering convictions. *Febus*, 218 F.3d at 789. He contended that the payments to the couriers and winning bettors did not "promote the carrying on" of the bolita because they were an integral part the operation and thus merely completed the illegal gambling offense. *Ibid.* He argued that the money laundering statute "only punishes the practice of reinvesting the proceeds of an already completed unlawful activity to promote the expansion of that unlawful activity." *Ibid.*

The court of appeals rejected that argument. The court relied on Seventh Circuit precedent holding that "[a] transaction satisfies the promotion provision of the money laundering statute if it constitutes 'the practice of plowing back proceeds of [the illegal activity] to promote that activity.'" *Febus*, 218 F.3d at 789 (quoting *United States* v. *Jackson*, 935 F.2d 832, 842 (7th Cir. 1991)). The court concluded that the government had

proved that type of promotion in this case by establishing that Santos had "reinvested the bolita's proceeds to ensure its continued operation for over 5 years, well beyond the 30 days required to complete the substantive offense of illegal gambling under 18 U.S.C. § 1955." 218 F.3d at 790. The court explained that the "payments to [the] collectors * * * compensated them for collecting the increased revenues and transferring those funds back to [Santos]. And [the] payments to the winning players promoted the bolita's continuing prosperity by maintaining and increasing the players' patronage." *Ibid.* The court of appeals noted that the annual receipts of the bolita expanded from approximately $250,000 in 1989 to approximately $410,000 in 1994. *Ibid.*

Diaz, for his part, challenged the district court's refusal to allow him to withdraw his guilty plea. Diaz argued that the government had breached the plea agreement by failing to seek a downward departure for substantial assistance. The court of appeals concluded that Diaz did not provide substantial assistance because he failed to give complete, truthful, and candid testimony at the trial of his co-conspirators. The court of appeals therefore upheld the district court's refusal to allow Diaz to withdraw his plea. *Febus*, 218 F.3d at 790-791.

Accordingly, the court of appeals affirmed respondents' convictions. *Febus*, 218 F.3d at 798. Santos petitioned for a writ of certiorari, and this Court denied the petition. 531 U.S. 1021 (2000).

4. After respondents' convictions became final on direct review, the Seventh Circuit reversed money laundering convictions stemming from acts very similar to those committed by respondents. In *United States* v. *Scialabba*, 282 F.3d 475 (7th Cir.), cert. denied, 537 U.S.

1071 (2002), the defendants provided video poker and slot machines to bars, restaurants, and other retail outlets. Each week, the defendants opened the machines and collected any deposited money, which they then used to reimburse the outlet owners for payments to winning customers, to compensate the outlet owners for their role, to lease the gambling machines, and to obtain the amusement licenses necessary to operate the machines. See *id.* at 476. Based on those expenditures, the *Scialabba* defendants were convicted of laundering the proceeds of an illegal gambling operation, in violation of 18 U.S.C. 1956(a)(1)(A)(i). The court of appeals vacated the money laundering convictions. The court held that funds used to cover the overhead expenses of an illegal activity are not "proceeds" within the meaning of Section 1956(a)(1) because the word "proceeds" means only the "net income" or "profits" of illegal activity. *Scialabba*, 282 F.3d at 478.

The government petitioned for rehearing en banc, arguing that the term "proceeds" in the money laundering statute means gross receipts and is not limited to profits. The petition was denied by an evenly-divided court, with one judge recused. See App., *infra*, 8a n.3. The government then unsuccessfully petitioned for a writ of certiorari on the same issue. *United States* v. *Scialabba*, 537 U.S. 1071 (2002).

5. Following the decision in *Scialabba*, respondents filed motions for collateral relief under 28 U.S.C. 2255. The district court granted the motions in part and vacated respondents' money laundering convictions. App., *infra*, 17a-79a.

The district court concluded that it was not precluded from granting relief by the Seventh Circuit's affirmance of Santos's money laundering convictions in

Febus. The district court reasoned that *Febus* and *Scialabba* addressed different issues: "while the *Scialabba* court concerned itself with the interpretation of the term 'proceeds,' as used in § 1956(a)(1), the *Febus* [c]ourt was not asked to, and therefore did not decide *anything* about the term 'proceeds.'" App., *infra*, 44a, 73a. The district court then held that respondents were entitled to the benefit of *Scialabba*, because, under the Seventh Circuit's narrow interpretation of "proceeds," they stood convicted of conduct that did not violate the money laundering statute. *Id.* at 45a-49a, 73a-78a. The district court explained that *Scialabba* undermined respondents' money laundering convictions because "it clearly appears that the proceeds admittedly used by Santos to pay winners and couriers [including Diaz] *could only have been* gross proceeds." *Id.* at 49a; see *id.* at 77a-78a.

6. The government appealed to the Seventh Circuit with a request for initial en banc consideration. The court of appeals denied the request for initial en banc consideration. App., *infra*, 80a. A panel of the court subsequently reaffirmed *Scialabba* and upheld the judgments of the district court. *Id.* at 1a-16a.

The court of appeals explained that, under the doctrine of *stare decisis*, its decision in *Scialabba* was entitled to "considerable weight." App., *infra*, 9a. Although the court believed that "[t]he government [had] raise[d] several important points in favor of its position," the court concluded the government's arguments were not sufficient to satisfy the heavy standard for overturning circuit precedent. *Id.* at 10a.; see *id.* at 14a-15a.

The court of appeals acknowledged that, since *Scialabba* was decided, several other courts of appeals had addressed the meaning of "proceeds" in Section

1956(a)(1), and "all the other circuits" had "rejected *Scialabba's* approach." App., *infra*, 10a. See *id.* at 10a-12a (discussing *United States* v. *Grasso*, 381 F.3d 160 (3d Cir. 2004), vacated and remanded on other grounds, 544 U.S. 945 (2005), reinstated in relevant part, Nos. 03-1441 & 03-1442 (3d Cir. May 20, 2005); *United States* v. *Iacaboni*, 363 F.3d 1 (1st Cir.), cert. denied, 543 U.S. 978 (2004); and *United States* v. *Huber*, 404 F.3d 1047, 1058 (8th Cir. 2005)).

The court of appeals then considered the government's contention that *Scialabba* had eviscerated the promotional subsection of Section 1956(a)(1) by limiting the crime of money laundering to situations in which criminals conceal their proceeds. The court stated that the government was reading the *Scialabba* opinion too broadly. The court explained that, "[w]hile, under *Scialabba*, the act of paying a criminal operation's expenses out of its gross income is not punishable under § 1956(a)(1)(A)(i)—but rather is punishable as part of the underlying crime—the act of reinvesting a criminal operation's net income to promote the carrying on of the operation is still punishable under § 1956(a)(1)(A)(i)." App., *infra*, 12a.

The court of appeals found more troubling the government's contention that the *Scialabba* rule impedes effective enforcement of the prohibitions against money laundering. The court acknowledged that interpreting "proceeds" to mean net income could cause "evidentiary problems" for the government and complicate the work of judges and juries. App., *infra*, 13a. The court explained that "criminals do not always keep ready records of their dealings, and, when they do, the line between the payment of expenses and reinvestment of net income is, generally speaking, murky, especially given

the likely absence of accounting standards." *Ibid.* Nevertheless, the court did not believe that this "solid policy point" was enough to justify overruling *Scialabba*. *Ibid.*

The court of appeals also observed that the sentencing consequences of *Scialabba* would weaken the government's hand in combating large-scale gambling operations. App., *infra*, 13a-14a. The court explained that, if the government is unable to establish a business's net income, the statutory maximum for a defendant engaged in an illegal gambling operation falls from 240 months of imprisonment under Section 1956(a)(1) to 60 months of imprisonment under Section 1955(a). *Id.* at 13a. The court added that, although the Sentencing Guidelines increase a defendant's base offense level in certain circumstances for the amount of funds laundered, see Sentencing Guidelines § 2S1.1(a)(2) (cross-referencing Sentencing Guidelines § 2B1.1), there is no similar increase under the Guideline for illegal gambling for the amount of funds involved, see Sentencing Guidelines § 2E3.1. App., *infra*, 13a-14a.

The court of appeals concluded that "the government ha[d] demonstrated that the question of whether Congress intended the term proceeds in § 1956(a)(1)(A)(i) to mean gross or net income is a debatable one." App., *infra*, 14a. The court determined, however, that the government's showing was not enough to meet the compelling-reasons standard for overturning circuit precedent. The court explained that, "[r]ather than vacillate over Congress's intent, it is better for our circuit here, having already considered and duly decided the issue, to stay the course at this juncture, for only Congress or the Supreme Court can definitively resolve the debate over this ambiguous term." *Id.* at 14a-15a (footnote omitted).

REASONS FOR GRANTING THE PETITION

The court of appeals has misconstrued the principal federal money laundering statute in a way that conflicts with decisions of other courts of appeals and significantly impedes effective enforcement of the law. The court's holding that the word "proceeds" in 18 U.S.C. 1956(a)(1) means "net income" or "profits" is contrary to the common understanding of the word. The court's interpretation of "proceeds" also rejects the meaning that Congress gave the same term in related statutes, including one enacted just two years before the money laundering statute.

The court's erroneous holding warrants review. It squarely conflicts with decisions of other courts of appeals and cannot be reconciled with the results and reasoning in numerous other money laundering cases. It removes a large class of routinely-prosecuted money laundering cases from the reach of the statute. And, in other cases, it subjects the government to an unreasonable burden of proof and enmeshes the courts in intractable disputes over the accounting principles that should govern illegal enterprises. Although the government unsuccessfully petitioned for a writ of certiorari on the same issue in *United States* v. *Scialabba*, 537 U.S. 1071 (2002), a clear-cut circuit conflict has now developed, and the Seventh Circuit has announced its intention to adhere to its isolated view. Accordingly, this Court's review is warranted.

A. The Court Of Appeals' Decision Incorrectly Constricts The Scope And Impairs The Enforcement Of The Money Laundering Statute

The principal federal money laundering statute prohibits transactions in unlawfully derived "proceeds"

when those transactions are intended to promote the underlying illegal activity, as well as when they are designed to conceal the proceeds. 18 U.S.C. 1956(a)(1)(A)(i). The Seventh Circuit requires the government to prove that the funds used in those transactions represent the "profits" of illegal activity. That court thus demands that the government establish the profitability of illegal activity, such as drug dealing and gambling, in order to convict defendants for money laundering connected to that activity.

The court of appeals' rule directly precludes money laundering prosecutions based on financial transactions by criminals to pay the expenses of their illegal enterprises. The rule does so even when the payment of expenses promotes the continuation of the illegal business or is done in a manner that conceals the origins of the funds. The rule also creates serious obstacles to effective prosecution in virtually all other money laundering cases, because it imposes an unreasonable burden of proof on the government and entangles the courts in complicated interpretative questions. Unlike legitimate businesses, criminals rarely keep accounting records, much less accurate ones. The Seventh Circuit itself has noted the "extreme difficulty in this conspiratorial, criminal area of finding hard evidence of net profits." *United States* v. *Jeffers*, 532 F.2d 1101, 1117 (7th Cir. 1976), aff'd in part and vacated in part, 432 U.S. 137 (1977). Even if documentation can be found, it is not clear what accounting principles should apply to the operations of criminal enterprises, for the accounting industry does not prescribe standards for illegal ventures. Thus, as even the court of appeals acknowledged, App., *infra*, 13a, its rule encumbers the prosecution of money laundering cases with significant complications. If Con-

gress had legislated a "profits" rule, then the government and the courts would have to shoulder that burden. But an examination of the statutory text and background reveals that Congress did no such thing.

1. The court of appeals' definition of "proceeds" as "net income" or "profits" is contrary to the word's most common and "primary meaning." *Muscarello* v. *United States*, 524 U.S. 125, 128 (1998). The initial definitions of "proceeds" provided by the *Random House Dictionary of the English Language* (2d ed. 1987), which lists first the most frequently encountered meaning of a word, *id.* at xxxii, are "something that results or accrues" and "the total amount derived from a sale or other transaction." *Id.* at 1542 (emphasis added). The dictionary offers "profits" only as a secondary, less common definition. *Ibid.* Likewise, *Black's Law Dictionary* (8th ed. 2004) defines "proceeds" as "1. The value of land, goods, or investments when converted into money; the amount of money received from a sale. * * * 2. Something received upon selling, exchanging, collecting, or otherwise disposing of collateral." *Id.* at 1242. *Black's Law Dictionary* distinguishes "proceeds" from "net proceeds," which, in a sub-entry under "proceeds," it defines as "[t]he amount received in a transaction minus the costs of the transaction (such as expenses and commissions)." *Ibid.* *Webster's Third New International Dictionary* (2002) (*Webster's*) also leads with the "gross receipts" meaning of "proceeds." *Webster's* provides, as the initial definition, "what is produced by or derived from something (as a sale, investment, levy, business) by way of total revenue: the total amount brought in." *Id.* at 1807. See also *Webster's New International Dictionary of the English Language* 1972 (2d ed. 1958) ("That which results, proceeds, or accrues

from some possession or transaction; esp., the amount realized from a sale of property.").

The "profits" definition used by the Seventh Circuit also departs from the meaning that Congress accorded the word "proceeds" just two years before it enacted the money laundering statute, when Congress amended the Racketeer Influenced and Corrupt Organizations (RICO) forfeiture statute. The forfeiture provision, as amended, provides that a RICO offender must forfeit "any property constituting, or derived from, any *proceeds* which the person obtained, directly or indirectly, from racketeering activity." 18 U.S.C. 1963(a)(3) (emphasis added). All but one of the courts of appeals that have addressed the issue have determined that the word "proceeds," as used in that provision, means gross receipts, not profits. See *United States* v. *Simmons*, 154 F.3d 765, 770-771 (8th Cir. 1998); *United States* v. *DeFries*, 129 F.3d 1293, 1313-1314 (D.C. Cir. 1997); *United States* v. *Hurley*, 63 F.3d 1, 21 (1st Cir. 1995), cert. denied, 517 U.S. 1105 (1996).[1]

The legislative history of the RICO forfeiture statute confirms that "proceeds" does not mean "profits."

> [T]he term "proceeds" has been used in lieu of the term "profits" in order to alleviate the unreasonable burden on the government of proving net profits. It should not be necessary for the prosecutor to prove what the defendant's overhead expenses were.

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[1] The Seventh Circuit is the lone exception. As with the money laundering statute, the Seventh Circuit has held that "proceeds" in the RICO forfeiture statute means net rather than gross receipts. See *United States* v. *Genova*, 333 F.3d 750, 761 (7th Cir. 2003) (reaffirming *United States* v. *Masters*, 924 F.2d 1362, 1369-1370 (7th Cir.), cert. denied, 500 U.S. 919, 502 U.S. 823 (1991)).

S. Rep. No. 225, 98th Cong., 1st Sess. 199 (1983). Indeed, the Senate Report on the RICO forfeiture provision specifically cited the Seventh Circuit's recognition in *Jeffers* that reliable evidence of "net profits" in criminal conspiracies is hard to adduce. *Id.* at 199 n.24. There is no reason to believe that Congress intended to deviate from its approach in the RICO statute when it enacted the money laundering statute shortly thereafter and used the same term, "proceeds." The concern about the difficulty of proving "net profits" is no less germane to the money laundering statute than to the RICO statute. Rather, it is logical to conclude that Congress intended a consistent meaning for the term "proceeds" in those provisions.

Similarly, courts of appeals have interpreted the term "proceeds" in other related statutes to mean gross receipts rather than profits. See, *e.g.*, *United States* v. *Silvestri*, 409 F.3d 1311, 1333 (11th Cir.) (adopting the above-quoted *Webster's* definition of "proceeds" for purposes of 18 U.S.C. 1957, another money laundering provision), cert. denied, 126 S. Ct. 772 (2005); *United States* v. *McHan*, 101 F.3d 1027, 1041-1042 (4th Cir. 1996) (interpreting "proceeds" as used in 21 U.S.C. 853, the drug forfeiture statute, to mean gross receipts rather than profits), cert. denied, 520 U.S. 1281 (1997).[2]

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[2] In the context of civil forfeiture, for cases like this one, involving illegal goods, services, or activities, Congress has explicitly defined "proceeds" to mean all property obtained as a result of the offense and provided that proceeds "is not limited to the net gain or profit realized from the offense." 18 U.S.C. 981(a)(2)(A). That approach confirms the general definition of proceeds that applies in the criminal context. Congress has, however, adopted a different definition of proceeds for certain other civil forfeiture cases. In cases involving lawful goods or lawful services that are sold or provided in an illegal manner, the civil forfeiture statute allows the subtraction of "the direct costs incurred

2. The Seventh Circuit's definition of "proceeds" as "profits" or "net income" also presents serious practical problems for money laundering prosecutions. The terms "profits" and "net income" have concrete meaning only after the application of a system of accounting principles. But there are no generally accepted accounting principles for criminal enterprises. Therefore, application of a "profits" approach would require the courts to formulate an accounting theory for illegal businesses. The courts would have to resolve novel and difficult questions, such as whether illicit profit should be measured using accrual or cash accounting methods; whether profit should be measured on an annual, monthly, or other basis; how "capital expenses" should be amortized; and what costs can legitimately be deducted to arrive at the profit figure (*e.g.*, can the operator of an illegal business deduct a "salary" to compensate himself for the time he devotes to the business? can overhead expenses be deducted? how should expenses

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in providing the goods or services," 18 U.S.C. 981(a)(2)(B), but it requires the claimant to carry the burden of proof and excludes overhead or income tax expenses, *ibid.* And "in cases involving fraud in the process of obtaining a loan or extension of credit," the civil forfeiture statute specifies that the claimant is entitled to a "deduction from the forfeiture to the extent that the loan was repaid, or the debt was satisfied, without any financial loss to the victim." 18 U.S.C. 981(a)(2)(C). The government has the option of seeking in a criminal case to obtain the forfeiture of any property that it may obtain through the civil provision. See 28 U.S.C. 2461(c). But nothing in the two special definitions of proceeds in that provision suggests that Congress intended generally in the criminal context to vary from the standard definition of "proceeds." Indeed, in the general criminal forfeiture statute, Congress used the words "proceeds," "gross receipts," and "gross proceeds" interchangeably. See, *e.g.*, 18 U.S.C. 982(a)(2), (3)(F), (4) and (5); 18 U.S.C. 982(a)(8)(B) (Supp. IV 2004).

associated with an abandoned "job" be treated?). It is unlikely that Congress would have handed such a difficult task to the courts, especially when there is no ready body of case law or other guidance for them to use to accomplish it.

The "profits" definition of proceeds imposes untenable burdens on the government as well as the courts. Under the "profits" rule, the government is absolutely precluded from prosecuting as money laundering a defendant's use of the receipts of unlawful activity to cover the expenses incurred in conducting that activity. As the district court noted in this case, funds used to cover the expenses of a crime cannot be the net income or profits of that crime. See App., *infra*, 49a, 77a-78a. A prosecution is thus precluded even when the payment of expenses clearly promoted the continued existence and expansion of the illegal business. Indeed, at an earlier stage of this very case, the Seventh Circuit expressly held that Santos's payments to the bolita's winners and employees "promoted" the prosperity and growth of that illegal enterprise. See *Febus*, 218 F.3d at 790 (describing how those payments enabled the bolita to grow from approximately $250,000 in annual revenue in 1989 to approximately $410,000 in annual revenue in 2004). A prosecution is also precluded even when the expense transactions are conducted in nefarious ways to conceal the illegal origin of the funds. That makes little sense because concealing the gross receipts of criminal activity can be just as effective in impeding detection and prosecution of that activity as concealing the profits of the activity. It is not obvious why the actions of concealing and disguising the receipts from a criminal operation are any less nefarious when the underlying operation ran at a loss or merely broke even, instead of being a particu-

larly profitable "job." Either way, the criminal has a need to disguise the receipts.

The "profits" definition also creates substantial burdens on effective prosecution of other money laundering cases. The court of appeals asserted that, under the "profits" rule, "the act of reinvesting a criminal operation's net income to promote the carrying on of the operation is still punishable under § 1956(a)(1)(A)(i)." App., *infra*, 12a. But, in order to obtain a conviction under the court's rule, the government must prove that the money that was reinvested was "net income" or "profits." As the court itself recognized, that requirement will frequently prove an insurmountable hurdle because "criminals do not always keep ready records of their dealings, and, when they do, the line between the payment of expenses and reinvestment of net income is, generally speaking, murky." *Id.* at 13a.

Thus, the "profits" rule dramatic curtails the scope of the money laundering statute as it has traditionally been understood. Prosecutions based on the payment of overhead expenses[3] and prosecutions based on the rein-

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[3] See, *e.g.*, *United States* v. *Alerre*, 430 F.3d 681, 695 (4th Cir. 2005) (distribution of funds obtained through unlawful prescription drug sales and health care fraud to physicians, employees, and owners as "compensation for their efforts"), cert. denied, 126 S. Ct. 1925 (2006); *United States* v. *Caplinger*, 339 F.3d 226, 233 (4th Cir. 2003) (use of fraudulently obtained funds to purchase supplies, make repairs to corporate plane, and pay rent and salaries); *United States* v. *Bolden*, 325 F.3d 471, 479 (4th Cir. 2003) (use of fraudulently obtained funds to compensate accomplice); *United States* v. *Evans*, 272 F.3d 1069, 1082 (8th Cir. 2001) (prostitute's payments to escort agency from proceeds of prostitution), cert. denied, 535 U.S. 1029, 1072, and 1087, 537 U.S. 857 (2002); *United States* v. *Wyly*, 193 F.3d 289, 295-296 (5th Cir. 1999) (kickback to public official for his participation in fraud scheme); *United States* v. *Rudisill*, 187 F.3d 1260, 1267 (11th Cir. 1999) (use of proceeds

vestment of illegally-derived funds[4] have tradition-

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from illegal telemarketing scheme to cover payroll expenses of scheme); *United States* v. *Reed*, 167 F.3d 984, 993 (6th Cir.) (drug proceeds used to pay antecedent drug debt), cert. denied, 528 U.S. 897 (1999); *United States* v. *King*, 169 F.3d 1035, 1039 (6th Cir.) (use of drug proceeds to pay drug couriers for drugs delivered on consignment), cert. denied, 528 U.S. 892 (1999); *United States* v. *France*, 164 F.3d 203, 208-209 (4th Cir. 1998) (drug proceeds used to post bail for confederate in scheme), cert. denied, 527 U.S. 1010 (1999); *United States* v. *Hildebrand*, 152 F.3d 756, 762 (8th Cir.) (use of proceeds of fraud scheme to pay for office supplies, secretarial services, and staff wages in furtherance of scheme), cert. denied, 525 U.S. 1033 (1998); *United States* v. *Coscarelli*, 105 F.3d 984, 990 (5th Cir.) (proceeds of telemarketing fraud used to pay co-conspirators and cover overhead expenses), vacated, 111 F.3d 376 (5th Cir. 1997), reinstated in relevant part, 149 F.3d 342 (5th Cir. 1998) (en banc); *United States* v. *Marbella*, 73 F.3d 1508, 1514 (9th Cir. 1996) (use of proceeds from fraudulent scheme to compensate individuals for referring victims); *United States* v. *Skinner*, 946 F.2d 176, 177-178 (2d Cir. 1991) (use of drug proceeds to pay supplier).

[4] See, *e.g.*, *United States* v. *Silvestri*, 409 F.3d 1311, 1335 (11th Cir.) (use of proceeds of Ponzi scheme to pay earlier investors in order to continue scheme), cert. denied, 126 S. Ct. 772 (2005); *United States* v. *Williamson*, 339 F.3d 1295, 1302 (11th Cir. 2003) (use of fraudulently obtained proceeds "promoted not only * * * prior unlawful activity, but also * * * ongoing and future unlawful activity"), cert. denied, 540 U.S. 1184 (2004); *United States* v. *Godwin*, 272 F.3d 659, 669 (4th Cir. 2001) (use of proceeds from Ponzi scheme to pay "interest" to investors), cert. denied, 535 U.S. 1069 (2002); *United States* v. *Barragan*, 263 F.3d 919, 924 (9th Cir. 2001) (use of drug proceeds to rent motel rooms for conducting future drug deals); *United States* v. *Dovalina*, 262 F.3d 472, 476 (5th Cir. 2001) (use of drug proceeds "to promote additional marijuana sales"); *United States* v. *Stewart*, 256 F.3d 231, 250 (4th Cir.) ("a portion of the drug proceeds were reinvested into the drug operation"), cert. denied, 534 U.S. 1049 (2001), 535 U.S. 977 (2002); *United States* v. *Burgos*, 254 F.3d 8, 13 (1st Cir.) (use of drug proceeds to buy additional drugs for distribution), cert. denied, 534 U.S. 1010 (2001); *United States* v. *Meshack*, 225 F.3d 556, 572-573 (5th Cir. 2000) (use of drug proceeds to pay for truck used in later drug sales), cert. denied,

ally constituted the vast majority of promotional money laundering cases. The "profits" rule forecloses prosecution of expense cases as a legal matter and severly limits prosecution of reinvestment cases as a practical matter.

The definition of "proceeds" adopted by the court of appeals will also likely impede prosecutions under the concealment subsection of the money laundering statute. Like the promotion subsection, the concealment subsection is violated only if a transaction involves the "proceeds" of specified unlawful activity. See 18 U.S.C. 1956(a)(1)(B)(i). The term "proceeds" that was construed in *Scialabba* and in this case appears in the introductory language of Section 1956(a)(1), which applies to both subsections. See 18 U.S.C. 1956(a)(1). And the court of appeals in this case described *Scialabba* as "holding that the term 'proceeds' in *§ 1956(a)(1)* means net income." App., *infra*, 15a-16a (emphasis added).

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531 U.S. 1100 (2001); *United States* v. *Taylor*, 239 F.3d 994, 998-999 (9th Cir. 2001) (use of proceeds from prostitution to transport minors across state lines for prostitution); *United States* v. *Haun*, 90 F.3d 1096, 1100 (6th Cir. 1996) (use of proceeds of fraud to promote "ongoing and future criminal activity"), cert. denied, 519 U.S. 1059 (1997); *United States* v. *Golb*, 69 F.3d 1417, 1424 (9th Cir. 1995) (use of drug proceeds to facilitate use of planes for drug trafficking); *United States* v. *Thomas*, 12 F.3d 1350, 1360 (5th Cir.) (use of drug proceeds to pay for later drug purchases), cert. denied, 511 U.S. 1095 and 1114 (1994); *United States* v. *Cruz*, 993 F.2d 164, 167 (8th Cir. 1993) (use of drug proceeds to buy vehicle to transport drugs); *United States* v. *Cole*, 988 F.2d 681, 682 (7th Cir. 1993) (use of proceeds from investment scheme to pay "interest" to defrauded investors when "necessary to keep the scheme going"); *United States* v. *Johnson*, 971 F.2d 562, 566 (10th Cir. 1992) (use of proceeds of fraud to pay off home mortgage and buy expensive car in order to impress prospective victims with defendant's business acumen); *United States* v. *Jackson*, 935 F.2d 832, 841 (7th Cir. 1991) (use of drug proceeds to buy beeper for use in ongoing drug operation).

Even money laundering violations under 18 U.S.C. 1957—which prohibits engaging in a monetary transaction in criminally derived property of a value greater than $10,000—require the existence of proceeds. See 18 U.S.C. 1957(f)(2) (defining "criminally derived property" as "any property constituting, or derived from, proceeds obtained from a criminal offense"). Thus, the court of appeals' "profits" rule could ultimately lead to a significant curtailment of all money laundering prosecutions.

3. The court of appeals reasoned that its interpretation of the word "proceeds" is necessary to maintain a distinction between the offense of money laundering and the underlying crime that produces the laundered proceeds. See *Scialabba*, 282 F.3d at 477; App., *infra*, 7a-8a. That is incorrect. As the Seventh Circuit and other courts have elsewhere recognized, the distinction between a money laundering transaction and the underlying crime is maintained by generally requiring that the charged financial transaction "must follow and must be separate from any transaction necessary for the predicate offense to generate proceeds." *United States* v. *Mankarious*, 151 F.3d 694, 706 (7th Cir.), cert. denied, 525 U.S. 1056 (1998); *United States* v. *Heaps*, 39 F.3d 479, 485-486 (4th Cir. 1994); *United States* v. *Conley*, 37 F.3d 970, 980 (3d Cir. 1994).

Thus, robbing a bank or selling illegal drugs cannot simultaneously be prosecuted as a predicate offense and as money laundering, because the money laundering statute requires a transaction using "the proceeds of specified unlawful activity," and there are no proceeds until the bank has been robbed or the drugs have been sold. See *Heaps*, 39 F.3d at 485. In contrast, a bank robber's use of the loot from a robbery to pay his accomplices can constitute money laundering, because the pay-

ment to the accomplices involves the proceeds generated by the robbery. Likewise, a drug trafficker's use of the money obtained from a drug sale to buy a stash house for his enterprise can constitute money laundering, because the house purchase is made with the proceeds generated by the completed drug sale. See *Conley*, 37 F.3d at 980 ("proceeds are derived from an already completed offense, or a completed phase of an ongoing offense").

In this case as well, the conduct constituting the money laundering transaction followed and was distinct from the predicate-offense conduct that produced the proceeds. The illegal gambling operation generated proceeds when the gamblers gave their wagers to the runners. Santos's payments to the runners and the collectors were distinct transactions made with those previously generated proceeds, just like a bank robber's payments to his accomplices. Similarly, the payments to winners were distinct transactions that occurred after the illegal gambling operation had yielded proceeds. Moreover, as the court of appeals recognized in *Febus*, 218 F.3d at 790, in each instance, the money laundering transactions promoted the continuation and expansion of the illegal gambling operation, which could not grow and prosper if it did not compensate its employees and pay winners. See *United States* v. *Iacaboni*, 363 F.3d 1, 5 (1st Cir.) ("nothing makes an illegal gambling operation flourish more than the prompt payment of winners") (quoting B. Frederic Williams & Frank D. Whitney, *Federal Money Laundering: Crimes and Forfeitures* 114 (1999)), cert. denied, 543 U.S. 978 (2004)); *United States* v. *Bolden*, 325 F.3d 471, 489 (4th Cir. 2003) (payments from fraudulently obtained funds "com-

pensated Nelson for his part in the scheme, encouraging his continued participation therein").

In short, the Seventh Circuit's cramped definition of "proceeds" is unnecessary to ensure that the underlying criminal act and the money laundering conduct remain distinct. Instead, it unjustifiably excludes from the money laundering statute conduct that goes beyond the underlying crime and entails use of the revenue produced by that crime to promote criminal activity—precisely what the promotion subsection of the statute is designed to prohibit. Moreover, the court's conversion of "proceeds" to "profits" has the effect of eliminating or hampering money laundering prosecutions when the money laundering is entirely distinct from the underlying criminal activity but that activity cannot be proved to have been profitable.

B. The Decision Of The Court Of Appeals Conflicts With Decisions Of Other Courts Of Appeals

The decision of the court of appeals is not only incorrect but also conflicts with the construction that the First and Third Circuits have accorded the term "proceeds" in the money laundering statute. Moreover, the decision below is at odds with the reasoning and results in numerous other money laundering decisions.

1. Since the decision in *Scialabba*, the First and Third Circuits have expressly considered and rejected the Seventh Circuit's construction of the word "proceeds" in the money laundering statute.

a. In *Iacaboni*, the defendant pleaded guilty to laundering the proceeds of an illegal gambling operation, in violation of Section 1956(a)(1)(A)(i), by using the proceeds to pay winning bettors. On appeal, the defendant contended that the district court's order forfeiting prop-

erty "involved in" the money laundering offense under 18 U.S.C. 982(a)(1) (Supp. I 2001) was erroneous. Relying on *Scialabba*, the defendant argued that his payments to the bettors did not involve proceeds because they were made with gross receipts rather than profits, and therefore the payments did not constitute money laundering. The First Circuit rejected that argument and held that the word "proceeds" in the money laundering statute is not limited to profits. The court explained that the Seventh Circuit's definition of "proceeds" places an "unreasonable burden on the government of proving net profits." 363 F.3d at 4 (quoting *United States* v. *Hurley*, 63 F.3d 1, 21 (1st Cir. 1995), cert. denied, 517 U.S. 1105 (1996)).

b. Similarly, in *United States* v. *Grasso*, 381 F.3d 160 (2004), vacated and remanded on other grounds, 544 U.S. 945 (2005), reinstated in relevant part, Nos. 03-1441 & 03-1442 (May 20, 2005), the Third Circuit explicitly rejected *Scialabba*'s reasoning and holding. In *Grasso*, the defendant was convicted, under Section 1956(a)(1)(A)(i), of laundering the proceeds of a fraudulent work-at-home scheme by reinvesting the proceeds to purchase advertising, telephone services, printing, envelopes, and other materials in furtherance of the scheme. On appeal, the defendant, relying on *Scialabba*, contended that the evidence failed to support his money laundering conviction because it did not show that the allegedly laundered funds represented "net profits" of the fraudulent scheme rather than "gross receipts or revenue." 381 F.3d at 164. The court of appeals rejected that claim and held that "'proceeds,' as that term is used in § 1956, means simply gross receipts from illegal activity. An individual may engage in money laun-

dering regardless whether his or her criminal endeavor ultimately turns a profit." *Id.* at 169.[5]

2. The Eighth Circuit, relying on *Grasso* but not mentioning *Scialabba*, has also adopted the view that the money laundering statute is not limited to financial transactions involving profits. In *United States* v. *Huber*, 404 F.3d 1047 (8th Cir. 2005), the defendant was convicted of various money laundering offenses involving income from a scheme fraudulently to obtain farm-program payments and federally subsidized crop-insurance benefits. On appeal, he challenged the forfeiture, under 18 U.S.C. 982(a)(1) (Supp. I 2001), of property "involved in" violations of Section 1956(a)(1), as well as other money laundering provisions, on the ground that the forfeited proceeds should have been offset by the expenses that went into producing them. The court rejected that claim and cited *Grasso* for the proposition that "expenses should not be deducted." 404 F.3d at 1058. Although the court in *Huber* did not expressly state that its holding was based on a construction of the term "proceeds" in Section 1956(a)(1), its citation of *Grasso* indicates that was the basis for the holding. Moreover, the court stated that the farm-program payments were "proceeds" within the meaning of the money laundering statute, see *ibid.*—a statement that cannot be reconciled with the Seventh Circuit's definition of "proceeds" as net income.

3. The definition of "proceeds" adopted by the Seventh Circuit is also at odds with the definition accorded the term by the Sixth Circuit. In *United States* v. *Haun*, 90 F.3d 1096 (1996), cert. denied, 519 U.S. 1059

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[5] Although the Third Circuit reviewed the defendant's claim for plain error, it concluded that there was no error of any kind and stated that it "would affirm even under *de novo* review." *Grasso*, 381 F.3d at 166.

(1997), the Sixth Circuit rejected a due process challenge to Section 1956(a)(1)(A)(i) that was based on the contention that the word "proceeds" is unconstitutionally vague. The court held that "proceeds" is not unconstitutionally vague because it "is a commonly understood word in the English language" that means "what is produced by or derived from something (as a sale, investment, levy, business) by way of *total revenue*." *Id.* at 1101 (emphasis added) (quoting *Webster's* 1807 (1971)). Accord *United States* v. *Prince*, 214 F.3d 740, 747 (6th Cir.), cert. denied, 531 U.S. 974 (2000); see *United States* v. *Monaco*, 194 F.3d 381, 385-386 (2d Cir. 1999) (rejecting vagueness challenge to the term "proceeds" in Section 1956(a)(1) and quoting *Haun*, 90 F.3d at 1101, for the proposition that "'[p]roceeds' is a commonly understood word in the English language"), cert. denied, 529 U.S. 1028 and 1077 (2000). The Sixth Circuit's "total revenue" definition directly contradicts the "profits" definition adopted by the Seventh Circuit.

4. The Seventh Circuit's definition also cannot be squared with the results in numerous cases in which courts of appeals have found sufficient evidence to support money laundering convictions based on the use of receipts of illegal activity to pay accomplices or other costs incurred to conduct that activity. See note 3, *supra* (collecting cases). Although the defendants in those cases did not argue that Section 1956(a)(1) prohibits only transactions involving net proceeds, the holdings of the cases reflect the understanding (which was universally accepted until the decision in *Scialabba*) that the statute applies to the payment of overhead expenses.

This Court should grant review to resolve the conflict among the courts of appeals on the meaning of the money laundering statute. A circuit conflict is particu-

larly problematic when, as here, the courts of appeals disagree on the substantive meaning of a widely used federal criminal statute. It is not acceptable for conduct to be money laundering in Boston and Philadelphia but not in Chicago.

C. The Question Presented Is Of Recurring Importance

Review is also warranted because the question presented is important, and the factual scenario that raises the question is a recurring one. Most prosecutions under the promotion subsection of the money laundering statute involve the use of revenue from criminal activity to pay the expenses of that activity or to promote its continuation or expansion. Those money laundering prosecutions are a vital part of the government's efforts to combat organized crime, drug trafficking, illegal gambling, and business fraud. The court of appeals' decision significantly impairs those law enforcement efforts.

The practical burdens on the effective enforcement of the congressional prohibition against money laundering have been described above. See pp. 15-19, *supra*. Equally problematic, the *Scialabba* rule will protect defendants whose illegal businesses are at any particular time unprofitable. It makes little sense to give a money laundering defense to drug dealers, gambling enterprise operators, and racketeers whose expenses over a period of time happen to exceed their revenue.

The burdens on the government and the courts are likely to arise in *all* money laundering cases in the Seventh Circuit because the government must establish that a financial transaction involves "proceeds" of unlawful activity not only in promotion cases but also in concealment cases and in cases involving monetary transactions in criminally derived property. See pp. 19-20, *supra*.

Because the court of appeals' decision, if allowed to stand, will pose broad and serious obstacles to enforcement of the congressional proscription of money laundering, this Court's intervention is warranted.

D. The Issue Is More Suitable for Review Now Than It Was At The Time Of *Scialabba*

In 2004, this Court denied the government's petition for a writ of certiorari in *Scialabba*, which raised the same issue presented here. Developments since the denial of certiorari in *Scialabba* now clearly make the issue ripe for review.

At the time of the government's petition in *Scialabba*, no other court of appeals had expressly rejected the Seventh Circuit's view that "proceeds" in the money laundering statute means "profits." Since then, two circuits have considered and expressly rejected the Seventh Circuit's view and have held that "proceeds" means gross receipts rather than profits. A third circuit, without expressly stating that it was construing the term "proceeds," has declined to limit the coverage of the money laundering statute to transactions involving profits.

Further, when this Court denied the petition for a writ of certiorari in *Scialabba*, there was reason to believe that the Seventh Circuit might eventually reconsider its decision, because it had denied the government's petition for rehearing en banc by an evenly-divided vote, with one judge recused. In the instant case, however, the government again requested the Seventh Circuit to overrule *Scialabba* in light of the conflicting decisions in other circuits. The Seventh Circuit declined to do so, first denying the government's petition for initial en banc consideration and then reaffirming that it

had determined to "stay the course" set by *Scialabba*. App., *infra*, 14a.

Because of the emergence of a square circuit conflict and the entrenchment of the *Scialabba* holding in the Seventh Circuit, the case for this Court's review is much stronger now than it was in *Scialabba*. As the court below recognized, App., *infra*, 14a-15a, barring congressional action, only this Court can now bring the courts of appeals into alignment on the proper construction of an important federal criminal statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2007

APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

Nos. 04-4221, 05-2316

EFRAIN SANTOS AND BENEDICTO DIAZ,
PETITIONERS-APPELLEES

v.

UNITED STATES, RESPONDENT-APPELLANT

Decided Aug. 25, 2006

BEFORE: MANION, KANNE, and ROVNER, Circuit Judges

MANION, Circuit Judge

Efrain Santos and Benedicto Diaz ran an illicit lottery, which landed them in federal prison on money laundering charges. Their money laundering convictions were premised upon the word "proceeds" in 18 U.S.C. § 1956(a)(1) meaning gross income of unlawful activity. This court affirmed the judgments against them in *United States v. Febus*, 218 F.3d 784 (7th Cir. 2000). However, in later proceedings under 28 U.S.C. § 2255, the district court vacated their money laundering convictions on the basis of our decision in *United States v. Scialabba*, 282 F.3d 475 (7th Cir. 2002), which defined "proceeds" to mean net income, as opposed to gross

income.[1] The government appeals, asking us to overturn *Scialabba* and interpret the pivotal term "proceeds" to mean gross income. In the interest of stability in the law, we decline to do so and thus affirm the district court's judgments in favor of Santos and Diaz.

I.

The underlying facts of this case are not in dispute. Efrain Santos operated an illegal lottery, known as a "bolita," in Northwest Indiana from the 1970s until the 1990s. It worked by gamblers placing their bets with the bolita's runners, primarily at local restaurants and taverns. The runners then turned the wagers over to the bolita's collectors, who, in turn, gave the money to Santos. One collector in Santos's employ was Benedicto Diaz. Santos paid, either directly or indirectly, the runners, the collectors, and, of course, the bolita's winners out of the total amount collected. Additional background on Santos, Diaz, and the bolita is detailed in our prior opinion on this matter, *see Febus*, 218 F.3d at 788-91.

A grand jury indicted Santos, Diaz, and eleven others in a ten-count indictment. It named Santos in all ten counts, and Diaz in counts one through four. Count 1 alleged a conspiracy to conduct an illegal gambling business, 18 U.S.C. § 371. Count 2 charged the defen-

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[1] The parties' briefs use the terms gross income, gross receipts, and gross revenue interchangeably to refer to the aggregate amount received into a business operation. In the interest of clarity, this opinion will use "gross income" in this context. Similarly, the parties employ the terms net income, net profits, net gains, net receipts, net revenues, and profits to describe the amount remaining after a business operation's expenses are subtracted from its gross income. This opinion will use "net income" to describe the same.

dants with conducting an illegal gambling business, 18 U.S.C. § 1955. Count 3 alleged a conspiracy to use the proceeds of an illegal gambling business to promote the carrying on of the business, i.e., a conspiracy to launder money, 18 U.S.C. §§ 1956(a)(1)(A)(i) & (h). Count 4 charged the defendants with money laundering by completing a financial transaction with the proceeds of the illegal gambling business with the intent to promote the carrying on of the business, 18 U.S.C. § 1956(a)(1)(A)(i). Counts 5 to 10 were similar money laundering charges under § 1956(a)(1)(A)(i).

A jury convicted Santos on the first five counts and acquitted him of the remainder. The district court sentenced him to 60 months of imprisonment on illegal gambling counts (1-2) and 210 months on the money laundering counts (3-5), all to run concurrently. For his part, Diaz pleaded guilty to count 3, conspiracy to launder money, and the other counts against him were dismissed. The district court sentenced him to 108 months of imprisonment. Thereafter, this court rejected Santos's and Diaz's direct appeals. *See Febus*, 218 F.3d at 789-91.

The two then initiated collateral proceedings with respective motions under 28 U.S.C. § 2255, each raising a number of issues. The district court rejected all but one issue in each case. The district court granted Santos and Diaz relief under § 2255 because—based upon our decision in *Scialabba*, which held that § 1956(a)(1)'s term "proceeds" meant net income, *see* 282 F.3d at 476-78—the district court held that Santos and Diaz were actually innocent of the crime of promotional money laundering and/or conspiracy to commit the same.

When the district court reached that conclusion, and thus vacated Santos's money laundering convictions (counts 3-5), Santos had already completed his concurrent 60-month sentences for his illegal gambling convictions (counts 1-2). Therefore, since the district court invalidated the only convictions keeping Santos in prison, the district court ordered his release upon his posting of a $20,000 unsecured bond. As for Diaz, the district court's § 2255 decision vacated his only count of conviction (count 3), and the district court likewise ordered his release with a $20,000 unsecured bond. The government appeals the grant of the two § 2255 motions.

II.

In challenging the district court's respective decisions to vacate Santos's and Diaz's money laundering convictions, the government raises one argument. It contends that the word "proceeds" in § 1956(a)(1) should be interpreted to mean gross income, not net income. The government's appeal here is thus nothing less than a frontal assault on *Scialabba*. In seeking to revive the vacated convictions, the government does not attempt to outflank or distinguish *Scialabba* in any way. Rather, it frankly concedes that, if the interpretation in *Scialabba* stands, there is insufficient evidence to support Santos's and Diaz's money laundering convictions and, as a result, the district court correctly vacated them. We first review the pertinent statutory section, as well as the holdings in *Febus*, and *Scialabba*, and how they impact the appeal before us.

Section 1956(a)(1)(A)(i) provides as follows:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of

> some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—(A)(i) with the intent to promote the carrying on of specified unlawful activity . . . shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. For purposes of this paragraph, a financial transaction shall be considered to be one involving the proceeds of specified unlawful activity if it is part of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement.

The unlawful activity here was an illegal gambling business, specifically, the bolita. Thus, to convict Santos of money laundering, the government had to prove that he knowingly conducted or attempted to conduct a financial transaction; that the property involved in the financial transaction in fact involved the proceeds of his bolita; that he knew that the property involved in the financial transaction represented illegal proceeds; and that he engaged in the financial transaction with the intent to promote the carrying on of the bolita. *See United States v. Emerson*, 128 F.3d 557, 561 (7th Cir. 1997); Seventh Circuit Pattern Criminal Jury Instructions 18 U.S.C. § 1956(a)(1)(A)(i) (1999). Such elements were also necessary to support Santos's and Diaz's related conspiracy convictions under § 1956(h). *See United States v. Turner*, 400 F.3d 491, 496 (7th Cir. 2005).

The financial transactions at issue in Santos's case were payments to the bolita's collectors and winners. With respect to Diaz, his conspiracy conviction was based upon the receipt of payment for his collection services. When the case arrived here on direct appeal, Santos acknowledged that he used the bolita's proceeds to pay its collectors' salaries and its winners' winnings. *See Febus*, 218 F.3d at 789. The focus in *Febus* was on § 1956(a)(1)(A)(i)'s promotion element: Santos argued that paying salaries and winnings did not promote the carrying on of the bolita. *See id.* at 789-90. As to the important issue in the present appeal, there was no dispute in *Febus* about the meaning of the word proceeds. In contrast to the current situation, Santos—by acknowledging that the salaries and winnings (i.e., operating expenses) came out of its "proceeds"—assumed that the term meant gross income, and *Febus* proceeded accordingly.

In addressing whether the government's case had met the promotion element, *Febus* determined that promotion under § 1956(a)(1)(A)(i) included "transactions that promote the continued prosperity of the underlying offense." *Id.* at 790 (citing *United States v. Conley*, 37 F.3d 970, 979 n. 12 (3d Cir. 1994)); *see also* 218 F.3d at 789 (discussing *United States v. Jackson*, 935 F.2d 832, 841-42 (7th Cir. 1991)). Consequently, *Febus* concluded that Santos's payments of proceeds to the collectors, including Diaz, fell into this category because those transactions "compensated them for collecting the [bolita's] increased revenues and transferring those funds back to [Santos]." 218 F.3d at 790. *Febus* further reasoned that winning payouts from the bolita's proceeds sufficiently promoted the carrying on of the unlawful activity in that the transactions "pro-

moted the bolita's continuing prosperity by maintaining and increasing the players' patronage." *Id.* (citing *United States v. Cole*, 988 F.2d 681, 684 (7th Cir. 1993)).

The gross-versus-net-income dispute then arose in *Scialabba*, which, while not mentioning *Febus* by name, distinguished *Febus* and its default treatment of the term proceeds as gross income by stating "[n]either the Supreme Court nor this circuit has defined the word 'proceeds' [in § 1956(a)(1)], and there is no definition in the statute itself." *Scialabba*, 282 F.3d at 475. The underlying offense in *Scialabba* was also illegal gambling. *See id.* at 475-76. The defendants operated video poker machines in taverns and other establishments. Among other crimes, the defendants were convicted of money laundering under § 1956(a)(1)(A)(i). Strikingly similar to the situation in *Febus*, the financial transactions at issue were the defendants' compensation-related payments to tavern owners who helped facilitate their gambling operation, including its collections, as well as the payouts to winning bettors. *See id.* at 476.

Scialabba, however, ruled that such transactions, which constituted the payment of the enterprise's operating expenses out of its gross income, could not support the defendants' money laundering convictions. *See id.* at 476-78. In reaching that result, *Scialabba* indicated that the term proceeds in § 1956(a)(1) was ambiguous, in that it was unclear if the term meant gross or net income. *See id.* at 477. *Scialabba* then, relying on the rule of lenity[2] and seeking to avoid "con-

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[2] When "there is a grievous ambiguity or uncertainty in the language and structure" of a statute, "the rule of lenity instructs that ambiguity in the meaning of a statutory provision should be resolved in favor of the defendant." *United States v. Turcotte*, 405 F.3d 515, 535 (7th Cir.

vict[ing] a person of multiple offenses when the transactions that violate one statute necessarily violate another," interpreted the term to mean net income. *Id.* ("By reading § 1956(a)(1) to cover only transactions involving [net income], we curtail the overlap [between the crime of money laundering and the underlying criminal activity] and ensure that the statutes may be applied independently to sequential steps in a criminal enterprise."). Specifically, *Scialabba* held "that the word 'proceeds' in § 1956(a)(1) denotes net rather than gross income of an unlawful venture," *id.* at 478, "otherwise the predicate crime merges into money laundering (for no business can be carried on without expenses) and the word 'proceeds' loses operational significance." *Id.* at 475; *see also id.* at 477-78 (distinguishing *United States v. Mankarious*, 151 F.3d 694, 706 (7th Cir. 1998); *Jackson*, 935 F.2d at 839-42; *Conley*, 37 F.3d 970). As a result, *Scialabba* vacated the defendants' money laundering convictions. *See* 282 F.3d at 478.[3]

The transactions in the present case—compensating the bolita's collectors and paying its winners—are conceptually indistinguishable from the transactions in *Scialabba* which were held to be insufficient under § 1956(a)(1)(A)(i). Such payments of the bolita's operat-

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2005) (quotations omitted).

[3] Upon the government's petition, a vote of the court's then-active members was requested to rehear *Scialabba* en banc, and the petition for rehearing en banc was denied by an equally divided court (5-5). *See United States v. Scialabba*, Nos. 01-1291 & 01-1292, 2002 U.S.App. LEXIS 10014, at *1 (7th Cir. May 22, 2002). The government's petition for a writ of certiorari was also denied. *See United States v. Scialabba*, 537 U.S. 1071, 123 S. Ct. 671, 154 L. Ed. 2d 565 (2002).

ing expenses came out of its gross income. Moreover, the government concedes that there is insufficient evidence in the record to show that the property involved in these transactions involved the bolita's net income, i.e., "proceeds" under *Scialabba*. Since the conduct that led to Santos's and Diaz's convictions only amounted to the disposition of the bolita's gross income, the district court reasoned that the two were convicted of "acts that are not now, nor ever have been, crimes" in this circuit and that the two are entitled to the benefit of *Scialabba* in their § 2255 proceedings. R.46 (Santos) at 27-31; R.38 (Diaz) at 22-25; *see also Lanier v. United States*, 220 F.3d 833, 838 (7th Cir. 2000) (discussing *Teague v. Lane*, 489 U.S. 288, 305-09, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); citing *Bousley v. United States*, 523 U.S. 614, 620, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998)). The government here presents no argument to the contrary, and we need not pursue these issues further in this opinion.

Rather, as indicated above, the only issue the government presents for our review is whether *Scialabba* should be overturned, which would thereby mandate the reversal of the district court's judgments in favor of Santos and Diaz. "We require a compelling reason to overturn circuit precedent." *McClain v. Retail Food Employers Joint Pension Plan*, 413 F.3d 582, 586 (7th Cir. 2005); *see also United States v. Shutic*, 274 F.3d 1123, 1126 (7th Cir. 2001). What is more, "principles of stare decisis require that we 'give considerable weight to prior decisions of this court unless and until they have been overruled or undermined by the decisions of a higher court, or other supervening developments, such as a statutory overruling.'" *Haas v. Abrahamson*, 910 F.2d 384, 393 (7th Cir. 1990) (quoting *Colby v. J.C.*

Penney Co., 811 F.2d 1119, 1123 (7th Cir. 1987)); *see also McClain*, 413 F.3d at 586; *Bethesda Lutheran Homes & Servs., Inc. v. Born*, 238 F.3d 853, 858-59 (7th Cir. 2001); *Mid-Am. Tablewares, Inc. v. Mogi Trading Co.*, 100 F.3d 1353, 1364 (7th Cir. 1996). Here, there has been no such decision by a higher court or a statutory overruling. *Scialabba* is thus entitled to "considerable weight."

The government raises several important points in favor of its position. To start, all the other circuits that have confronted the statutory debate over whether "proceeds" in § 1956(a)(1) means gross or net income have rejected *Scialabba's* approach. *See Russ v. Watts*, 414 F.3d 783, 788 (7th Cir. 2005) (discussing when other circuit opinions might present a compelling reason to overrule circuit precedent). Most prominent is the Third Circuit, which believes that *Scialabba* "reaches an incorrect result" and held that § 1956(a)(1)'s term proceeds "means simply gross receipts from illegal activity." *United States v. Grasso*, 381 F.3d 160, 167, 169 (3d Cir. 2004), *vacated on other grounds*, 544 U.S. 945-46, 125 S. Ct. 1696, 161 L. Ed. 2d 518 (2005). *Grasso* upheld money laundering convictions that were based upon a fraud scheme's advertising, printing, and mailing expenses. 381 F.3d at 162, 169. *Grasso* analyzed several dictionary and legal definitions for the word proceeds and correctly determined that the definitions showed that the word could mean either gross or net income. *Id.* at 167-68. For instance, *Grasso* noted that one dictionary defined proceeds as the "total amount brought in" but also as "net profit" and "the net sum received after deduction of any discount or charges." *Id.* at 167 (citing *Webster's Third New International Dictionary* 1807 (1986)). *Grasso* thus stated: "Given the many

definitions of 'proceeds' and the uncertain value of congressional records in choosing among them, the best approach, we believe, is to examine the statute itself for indications of the intended scope of the term." *Id.* at 168. Then, without discussing the rule of lenity and *Scialabba's* reliance upon it, *Grasso* summarily concluded that, because the statute prohibits the promotion of illegal activity, the use of an unlawful operation's gross income to sustain itself is "clear[ly]" punishable under the statute. *Id.* at 168-69 & n. 13; *but see Scialabba*, 282 F.3d at 477 ("[T]he context [of the statute] does not reveal whether the reference is to gross receipts or net income.").

The only two other circuits to address the gross-versus-net-income issue identified in *Scialabba* are the First and Eighth.[4] The First Circuit, in one brief paragraph in a forfeiture dispute, acknowledged *Scialabba*, but declined to read the § 1956(a)(1)'s term proceeds as net income based upon its prior interpretation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.* *See United States v. Iacaboni*, 363 F.3d 1, 4 (1st Cir. 2004) (citing *United States v. Hurley*, 63 F.3d 1, 21 (1st Cir. 1995)); *but see United States v. Genova*, 333 F.3d 750, 761 (7th Cir.

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[4] Several other circuit opinions available at the time *Scialabba* was decided treat the word proceeds in § 1956(a)(1) as gross income, but these earlier opinions did not enter (because they were not asked to) the gross-versus-net-income debate initiated by *Scialabba*. *See, e.g.*, *United States v. Monaco*, 194 F.3d 381, 385-86 (2d Cir. 1999); *United States v. Akintobi*, 159 F.3d 401, 403-05 (9th Cir. 1998); *United States v. Haun*, 90 F.3d 1096, 1101 (6th Cir. 1996). *See also United States v. Silvestri*, 409 F.3d 1311, 1332-33 (11th Cir. 2005) (18 U.S.C. § 1957 context; handling the term proceeds in a manner akin to that of *Akintobi* and *Haun*; no discussion of gross versus net income).

2003) (RICO forfeiture case defining proceeds as net income) (citing *United States v. Masters*, 924 F.2d 1362, 1369-70 (7th Cir. 1991); comparing *Scialabba*, 282 F.3d 475). Thus, *Iacaboni*, an illegal sports gambling case, ruled that payouts to winning bettors were financial transactions involving proceeds for § 1956(a)(1) purposes. 363 F.3d at 4. For its part, the Eighth Circuit, in another forfeiture situation, followed *Grasso* without discussion. *See United States v. Huber*, 404 F.3d 1047, 1058 (8th Cir. 2005). Thus, while there is certainly opposition to *Scialabba*, it is not as entrenched as the government paints it to be.

The government also maintains that *Scialabba* incorrectly limited the crime of money laundering to situations in which criminals conceal their proceeds, thereby eviscerating § 1956(a)(1)'s promotional subsection. *Grasso* mentioned this point as well. 381 F.3d at 168. This is a misreading of *Scialabba*. 282 F.3d at 476. To be sure, the statute criminalizes the concealment of proceeds and also prohibits the use of proceeds to promote the illicit activity. *Compare* 18 U.S.C. § 1956(a)(1)(B) *with* 18 U.S.C. § 1956(a)(1)(A)(i). *Scialabba*, however, did not override the latter. There is a distinct difference between paying expenses and reinvesting net income. While, under *Scialabba*, the act of paying a criminal operation's expenses out of its gross income is not punishable under § 1956(a)(1)(A)(i)—but rather is punishable as part of the underlying crime—the act of reinvesting a criminal operation's net income to promote the carrying on of the operation is still punishable under § 1956(a)(1)(A)(i). Furthermore, in mentioning concealment, *Scialabba* merely pointed out that concealment was not at issue and that the government's case rested solely on the disposition of gross

income and whether such disposition was actionable under § 1956(a)(1)(A)(i). 282 F.3d at 476. *Scialabba* touched upon the lack of concealment simply to show that, to resolve the case, the court had no alternative but to interpret the word proceeds.

Additionally, the government contends that serious evidentiary problems result from interpreting proceeds to mean net income. Sure enough, criminals do not always keep ready records of their dealings, and, when they do, the line between the payment of expenses and reinvestment of net income is, generally speaking, murky, especially given the likely absence of accounting standards. *See Grasso*, 381 F.3d at 169 n. 13. Sorting out an illicit business's net income, therefore, can complicate the government's task of proving promotional money laundering, not to mention courts' and juries' respective roles in defining and determining what is and is not net income. This is a solid policy point (which the government may wish to present to Congress), but it is not enough to overcome the considerable weight afforded to *Scialabba*.

That policy point does tie into a related concern raised at oral argument about the sentencing disparity between money laundering and, in this case, running an illegal gambling business. The elimination of Santos's money laundering convictions, for instance, ended his 210-month sentence, leaving him with only a 60-month sentence, which he had already served. Cf. *Scialabba*, 282 F.3d at 476 (similar differences). More generally, when, as in Santos's case, the government proves a defendant has engaged in an illegal gambling business but is unable to establish the business's net income for purposes of the money laundering statute, the statutory

maximum facing the defendant goes from 240 months to 60 months. *Compare* 18 U.S.C. § 1956(a)(1) *with* 18 U.S.C. § 1955(a). Moreover, in terms of money laundering, the Sentencing Guidelines ratchet up a defendant's base offense level in relation to the value of the laundered funds; however, there is no similar value/amount provision for engaging in an illegal gambling business. *Compare* U.S.S.G. § 2S1.1(a)(2) (2005) (cross-referencing U.S.S.G. § 2B1.1) *with* U.S.S.G. § 2E3.1 (2005). This concern, of course, is not grounds to overturn circuit precedent; we mention it here simply to note the sentencing consequences that can result when, due of a lack of net income evidence, § 1956(a)(1)(A)(i) is unavailable to the government in combating large-scale illegal gambling operations.

Having considered the government's arguments, the most we can say here is that the government has demonstrated that the question of whether Congress intended the term proceeds in § 1956(a)(1)(A)(i) to mean gross or net income is a debatable one. However, simply showing that a point is debatable is not enough to meet the compelling-reasons standard for overturning circuit precedent. *See Russ*, 414 F.3d at 788; *McClain*, 413 F.3d at 586-87; *Bethesda Lutheran*, 238 F.3d at 858-59. Overturning circuit precedent—upsetting the stability and predictability of the law—is not something that should be taken lightly (even when the previous decision was upheld by a 5-5 vote, *see supra* note 3). Rather than vacillate over Congress's intent, it is better for our circuit here, having already considered and duly decided the issue, to stay the course at this juncture, for only

Congress[5] or the Supreme Court can definitively resolve the debate over this ambiguous term. *See Midlock v. Apple Vacations West, Inc.*, 406 F.3d 453, 457 (7th Cir. 2005); *Bethesda Lutheran*, 238 F.3d at 858-59; *Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052, 1065 (7th Cir. 2000) ("Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." (quotation omitted)); *Mid-Am. Tablewares*, 100 F.3d at 1364 ("Stare decisis is of fundamental importance to the rule of law." (quotation omitted)); *see also Trompler, Inc. v. NLRB*, 338 F.3d 747, 753 (7th Cir. 2003) (Easterbrook, J., concurring) ("Restless movement from one side of this conflict to another will not make it go away; sooner or later, either Congress or the Supreme Court must bring harmony. Until that happens, judicial resources will be conserved, and predictability increased, if each circuit that has reached a decision sticks with it.").

III.

The government has not presented a compelling reason to overturn *Scialabba* and its holding that the

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[5] We briefly note that, in the closely related context of illegal gambling businesses, Congress has already quelled any debate over the type of funds that triggered criminal liability. One path to proving a § 1955 violation is to show that the illegal gambling business had "*gross* revenue of $2,000 in a single day." 18 U.S.C. § 1955(b)(1)(iii) (emphasis added). By similarly incorporating the word gross or net into § 1956 to define proceeds, Congress could quickly resolve the meaning of this problematic term.

term "proceeds" in § 1956(a)(1) means net income. Accordingly, the district court's respective judgments in favor of Santos and Diaz are AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

No. 2:01 CV 638

UNITED STATES, PLAINTIFF

v.

EFRAIN SANTOS, DEFENDANT

[Filed: Oct. 20, 2004]

MEMORANDUM AND ORDER

MOODY, District Judge.

Efrain Santos ("Santos" or "defendant") is a prisoner whose incarceration results from a judgment of this court. On November 30, 2001, he initiated this post-conviction proceeding by filing a motion pursuant to 28 U.S.C. § 2255. After reviewing Santos' § 2255 motion, this court determined that additional briefing was necessary. Accordingly, the government filed a response to Santos' motion on June 9, 2003, and Santos tendered his reply on July 7, 2003. After reviewing all of the materials submitted in this matter, the court, for the following reasons, **GRANTS** Santos' § 2255 motion **IN PART.**

I. BACKGROUND

On May 10, 1996, a federal grand jury returned a ten (10) count Indictment against Efrain Santos. (Indictment in Cause No. 2:96 CR 44, at docket # 1 [hereinafter Indictment]). The Indictment charged Santos for several acts committed in connection with his operation of an illegal lottery—known as a "Bolita"-in East Chicago, Indiana. In particular, Count 1 of the Indictment charged Santos with conspiracy to conduct an illegal gambling business in violation of 18 U.S.C. § 371; Count 2 charged Santos with conducting an illegal lottery business in violation of 18 U.S.C. § 1955; Count 3 charged Santos with conspiracy to use the proceeds of an illegal gambling business to promote the carrying on of that illegal gambling business in violation of 18 U.S.C. § 1956(h); Counts 4 and 5 charged Santos with money laundering to promote an illegal gambling business in violation of 18 U.S.C. § 1956(a)(1)(A)(i); and, Counts 6-10 charged Santos with other substantive money laundering offenses. Santos pled not guilty to each of the Counts against him, and went to trial with three other co-defendants.

Santos' trial commenced on September 29, 1997. At trial, it was determined that Santos had begun operating his Bolita in East Chicago, Indiana in the 1970's[1] and continued to do so until approximately 1994. There was a brief period in the late 1970's and early 1980's when

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[1] Before he began operating the Bolita in East Chicago, Indiana, Santos worked for Ken Eto, who ran a Bolita spanning both Illinois and Indiana in the late 1960's and early 1970's. (Tr. 1547-48). It appears Santos took over the Indiana portion of Eto's operation sometime in the early 1970's. (Tr. 1547-48).

Santos was absent from the Bolita business, and during that time, one of Santos' co-defendants, Roberto Febus (a.k.a. Bobby Santos), served as the Bolita's interim leader. (Tr. 1548-49). However, Santos returned in 1984.

The winning numbers in Santos' Bolita were based upon the daily Pick Three and Pick Four Illinois lottery games, and upon the Puerto Rican Lottery. (Tr. 733-34). Santos had runners accept bets for his Bolita primarily in bars and restaurants in East Chicago. (Tr. 587, 620-21, 734-35). The runners would take a commission of 15-25% from the bet money, (Tr. 738-39, 909), and then deliver the betting slips and the remaining bet money to "collectors," (Tr. 735-36, 740, 747, 1397-98, 1404, 1414). The collectors would then deliver the slips and bet money to Santos, (Tr. 740-41, 1404-05), but before doing so, they would often take a "salary" out of the collected bet money, (Tr. 755-56, 1399-1400), and on occasion would pay Bolita winners who won $100.00 or less, (Tr. 739, 1426). Santos ultimately paid the Bolita's "big" winners. (Tr. 739, 1427).

The FBI began investigating Santos' Bolita in 1992, (Tr. 138-39), and on March 30, 1993, the FBI executed search warrants for Santos' person, his house, his apartment, and his vehicle, as well as for the persons and vehicles of two of Santos' collectors, (Tr. 209-10, 463). From their search, the FBI found betting slips, ledgers, cash and other evidence of Santos' gambling enterprise. (*See, e.g.*, Tr. 209-14, 464-66, 562, 852-55, 1415). After the FBI's search, Santos closed down his Bolita, but only for a few weeks, (Tr. 747, 1420); operations soon resumed, although the location and collection

method for the Bolita had changed, (Tr. 747-48, 1419-20).

The FBI continued its surveillance of Santos' Bolita and conducted another search on June 22, 1993, (Tr. 221, 466), which returned further evidence of Santos' illegal gambling enterprise, (*see, e.g.*, Tr. 221-23, 466-67, 562, 855-56). This second search did not faze Santos, and the Bolita continued running without interruption. (Tr. 1429). The FBI then executed a third search on October 12, 1993, in which it again found betting sheets, betting slips, cash, and other evidence of Santos' illegal Bolita. (*See, e.g.*, Tr. 576-77).

After hearing all of this evidence at trial, the jury found Santos guilty on Counts 1-5 of the Indictment, and not guilty on Counts 6-10. (Tr. 2142; Minute Entry in Cause No. 2:96 CR 44, at docket # 261). As a result of the guilty verdicts, on April 15, 1998, this court sentenced Santos to 60 months on each of Counts 1 and 2, and to a term of imprisonment of 210 months on each of Counts 3, 4, and 5, all to be served concurrently. (Minute Entry in Cause No. 2:96 CR 44, at docket # 379). After receiving his sentence, Santos promptly filed his Notice of Appeal on April 23, 1998. (Notice of Appeal in Cause No. 2:96 CR 44, at docket # 390).

On appeal, Santos presented only one issue for review: He argued that "the evidence was insufficient to convict him of money laundering because his cash payment to the bolita's collectors and winners were essential transactions of the illegal gambling business, and thus cannot also constitute transactions under" § 1956(a)(1)(A)(i).[2] *United States v. Febus*, 218 F.3d 784,

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[2] Section 1956(a)(1)(A)(i) provides, in pertinent part:

(a)(1) Whoever, knowing that the property involved in a financial

789 (7th Cir. 2000). The Court of Appeals rejected Santos argument and affirmed his conviction. The Court stated:

> In this case, the government established that Santos reinvested the bolita's proceeds to ensure its continued operation for over 5 years, well beyond the 30 days required to complete the substantive offense of illegal gambling under 18 U.S.C. § 1955. Furthermore, [Santos'] own records show that the income to his bolita expanded from approximately $250,000.00 per year for the years 1989 to 1992, to $330,000.00 for 1993, and up to $410,000.00 for 1994. His payments to his collectors, Diaz and Morales, compensated them for collecting the increased revenues and transferring those funds back to him. And his payments to the winning players promoted the bolita's continuing prosperity by maintaining and increasing the players' patronage. (citation omitted). Therefore, the government produced sufficient evidence to enable a reasonable jury to find Santos guilty of money laundering beyond a reasonable doubt.

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transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

(A)(i) with the intent to promote the carrying on of specified unlawful activity;

* * * * * *

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

Id. at 790. Shortly after the Seventh Circuit's decision affirming Santos' conviction, Santos filed a petition for a *Writ of Certiorari.* However, the United States Supreme Court declined review. *Santos v. United States,* 531 U.S. 1021, 121 S. Ct. 587, 148 L. Ed. 2d 503 (2000).

Thus, on November 30, 2001, Santos filed the instant motion requesting that this court vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. (Def.'s § 2255 Mot. in Cause No. 2:01 CV 638, at docket # 9 [hereinafter Def.'s § 2255 Mot.]).[3] The undersigned engaged in the prescribed initial consideration, (*see* Rules Governing Section 2255 Proceedings, Rule 4(b)), and subsequently directed the United States Attorney to enter his appearance and file an Answer by January 11, 2002. (Order dated Dec. 10, 2001 in Cause No. 2:01 CV 638, at docket # 2). However, due to a delay caused by several continuances arising out of the Seventh Circuit's decision in *United States v. Scialabba,* 282 F.3d 475 (7th Cir. 2002)—an opinion which the government originally suspected conflicted with the Seventh Circuit's holding in Santos' direct appeal—the govern-

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[3] The original § 2255 motion filed by Santos on November 30, 2001, (*see* Cause No. 2:01 CV 638, at docket # 1), failed to comply with Local Rule 47.1 which requires that all § 2255 motions be filed upon the "form contained in the Rules following . . . 28 U.S.C. § 2255." N.D. Ind. L. CR. R. 47.1. Therefore, in an Order dated January 18, 2002, this court directed the Clerk to furnish Santos with a copy of the applicable form, and ordered Santos to comply with the LOCAL RULE no later than March 1, 2002. (Order dated Jan. 18, 2002 in Cause No. 2:01 CV 638, at docket # 7). The January 18 Order also noted that this court would construe Santos' original § 2255 filing as Memorandum of Law. (Order dated Jan. 18, 2002 in Cause No. 2:01 CV 638, at docket # 7). Santos promptly complied with this court's January 18 Order, and thus, his "proper" § 2255 motion appears at docket # 9 in Cause No. 2:01 CV 638.

ment did not tender its response until June 9, 2003. (Gov't Resp. in Cause No. 2:01 CV 638, at docket # 41 [hereinafter Gov't Resp.]). Santos then filed his reply on July 7, 2003. (Def.'s Reply in Cause No. 2:01 CV 638, at docket # 42 [hereinafter Def.'s Reply]). The court shall now address the merits of Santos' motion.

II. STANDARD OF REVIEW

"No prisoner has a constitutional entitlement to further review of the final judgment in a criminal case." *Farmer v. Litscher*, 303 F.3d 840, 844 (7th Cir. 2002) (citing *Freeman v. Page*, 208 F.3d 572, 576 (7th Cir. 2000)). However, with the enactment of 28 U.S.C. § 2255, Congress gave federal prisoners a right to launch a collateral attack against their conviction. Section 2255 ultimately grants the federal courts power "to vacate, set aside or correct the sentence" of a convicted prisoner, 28 U.S.C. § 2255 ¶ 1, but only if the prisoner is able to expose flaws in the conviction "which are jurisdictional in nature, constitutional in magnitude, or result in a complete miscarriage of justice," *Boyer v. United States*, 55 F.3d 296, 298 (7th Cir. 1995) (citation omitted). Thus, "relief under 28 U.S.C. § 2255 is reserved for extraordinary situations." *Prewitt v. United States*, 83 F.3d 812, 816 (7th Cir. 1996) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 633-34, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)).[4]

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[4] Emphasizing the social benefit of finality and advancing a jurisprudence of limited post-conviction success, the United States Supreme Court has stated:

> Once the defendant's chance to appeal has been waived or exhausted, . . . [the court is] entitled to presume he stands fairly and finally convicted, especially when, as here, he already has had a fair opportunity to present his federal claims to a federal forum.

A post-conviction proceeding under § 2255 "is not to be used as a substitute for a direct appeal." *United States v. Barger*, 178 F.3d 844, 848 (7th Cir. 1999) (citing *Theodorou v. United States*, 887 F.2d 1336, 1339 (7th Cir. 1989)); *accord Coleman v. United States*, 318 F.3d 754, 760 (7th Cir. 2003). Accordingly, the doctrine of procedural default precludes the district court from considering certain claims presented in a § 2255 motion that the defendant could have raised on direct appeal, unless the defendant "can show good cause for failing to raise the issue[s] and actual prejudice." *Galbraith v. United States*, 313 F.3d 1001, 1006 (7th Cir. 2002); *accord Mankarious v. United States*, 282 F.3d 940, 943 (7th Cir. 2002) ("An issue not raised on direct appeal is barred from collateral review absent a showing of both good cause for and actual prejudice resulting from the failure to assert it."), *cert. denied*, 537 U.S. 823, 123 S. Ct. 108, 154 L. Ed. 2d 32 (2002). "A showing that a refusal to consider the issue would be a fundamental miscarriage of justice" may also aid a prisoner in attaining review of a procedurally defaulted issue. *Galbraith*, 313 F.3d at 1006 (internal quotation marks and citation omitted).

III. DISCUSSION

Santos presents four (4) arguments for relief in his § 2255 motion. He generally alleges: (1) that he received

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Our trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless postconviction collateral attacks. To the contrary, *a final judgment commands respect. United States v. Frady*, 456 U.S. 152, 164-65[, 102 S. Ct. 1584, 71 L. Ed. 2d 816] (1982) (emphasis added).

ineffective assistance of counsel; (2) that the court imposed a sentence in excess of the maximum authorized by law; (3) that his sentence was imposed in violation of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); and, (4) that the opinion expressed by the Seventh Circuit in *Scialabba*, 282 F.3d 475, (a case decided subsequent to Santos' appeal), requires that his convictions for money laundering be set aside and that he be re-sentenced.[5] The court shall now address the merit of each of Santos' contentions.

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[5] Santos' § 2255 motion, which he originally filed *pro se*, is quite jumbled and disorganized, thus, it was somewhat difficult for this court to extricate (from the jumble) the actual issues Santos had presented for review under § 2255. In the end, in an order dated December 10, 2001, this court determined that Santos' motion presented three (3) coherent arguments for relief: (1) that his trial counsel was constitutionally ineffective; (2) that this court imposed upon him a sentence in excess of the maximum authorized by law; and, (3) that the decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), entitles him to collateral relief. (Order dated Dec. 10, 2001 in Cause No. 2:01 CV 638, at docket # 2). Approximately three (3) months after this court issued its December 10, 2001 Order, the United States Attorney's Office brought to this court's attention the decision in *United States v. Scialabba*, 282 F.3d 475 (7th Cir. 2002), which it believed might impact the disposition of Santos' § 2255 request for relief; thus, a fourth issue for review—whether the decision in *Scialabba* requires Santos' money laundering convictions to be set aside-was ostensibly added to the three others presented by Santos in his original § 2255 motion. Both parties have since agreed that there are indeed four (4) questions presented for review in this § 2255 action: (1) whether Santos received ineffective assistance of counsel; (2) whether the court imposed upon Santos a sentence in excess of the maximum authorized by law; (3) whether Santos' sentence was imposed in violation of *Apprendi*; and, (4) whether the opinion expressed by the Seventh Circuit in *Scialabba* requires that Santos' money laundering convictions be set aside and that he be re-sentenced. (*See* Gov't Resp., at 10-11; Def.'s Reply, at 5).

A. *Ineffective Assistance of Counsel Claims*

Santos makes three (3) general claims of ineffective assistance of counsel. He argues: (1) that his trial attorney, Nick Thiros, provided ineffective assistance by failing to object to the Pre-Sentence Investigation Report ("PSI"); (2) that Mr. Thiros provided ineffective assistance by failing to investigate the criminal statutes under which Santos was convicted; and, (3) that Mr. Thiros provided ineffective assistance by failing to object to this court's jurisdiction over Santos' criminal matter.[6] In seeking to prove that his counsel rendered ineffective assistance in these three (3) instances, Santos "bears a heavy burden." *Jones v. Page*, 76 F.3d 831, 840 (7th Cir. 1996) (citation omitted). Santos must show: (1) that his counsel's performance in the specified situation(s) was unreasonably deficient; and, (2) that "the deficient performance prejudiced the defense." *Strick-*

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[6] Although Santos has never before, in any court, raised any of these ineffective assistance claims, it matters little in as far as claims of ineffective assistance are not prone to procedural default. *Massaro v. United States*, 538 U.S. 500, 504, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003). Rather, ineffective assistance claims may be properly raised for the first time in a § 2255 proceeding. *Id.* ("We hold that an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal."); *accord United States v. Woolley*, 123 F.3d 627, 634 (7th Cir. 1997) ("The preferred method for raising a claim of ineffective assistance of counsel is either by bringing a motion for new trial or a request for collateral relief under 28 U.S.C. § 2255.") (internal quotation marks and citation omitted); *Jones v. United States*, 264 F. Supp. 2d 714, 716 (N.D. Ill. 2003) ("The Court in *Massaro* made clear . . . that ineffective assistance of counsel claims are an exception [to the procedural default rules] . . . and may be brought in a collateral proceeding under § 2255."). Therefore, Santos has appropriately raised his ineffective assistance claims for the first time in this § 2255 proceeding.

land v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). As the *Strickland* standard is formulated in the conjunctive, Santos must make the requisite showing on both elements; failure to prove either deficient conduct or prejudice invalidates an ineffective assistance claim, *see Rastafari v. Anderson*, 278 F.3d 673, 688 (7th Cir. 2002) ("A failure to establish either [*Strickland*] prong results in a denial of the ineffective assistance of counsel claim.") (citation omitted), *cert. denied sub nomine Rastafari v. Davis*, 537 U.S. 914, 123 S. Ct. 294, 154 L. Ed. 2d 196 (2002).

When considering whether an attorney's conduct was unreasonably deficient under the first prong of the *Strickland* test, a court must operate under a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and treat counsel's performance with high deference. *Strickland*, 466 U.S. at 689, 104 S. Ct. 2052; *accord Williams v. Washington*, 59 F.3d 673, 679 (7th Cir. 1995) (The first prong of *Strickland* "contemplates deference to strategic decision-making."). In order to prevail on the first prong of the *Strickland* test, a defendant must show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S. Ct. 2052. With regard to the second prong, the court will only disturb a criminal conviction if "there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." *Id.* at 694, 104 S. Ct. 2052. In other words, "[i]n order to demonstrate that his federal constitutional right to effective assistance of counsel was violated, a defendant must show that effective assistance would have given him a reasonable

shot at acquittal." *Gibbs v. VanNatta*, 329 F.3d 582, 584 (7th Cir. 2003) (noting that this is a "different and lower standard" than proving actual innocence); *accord Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) ("The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.").

1. *Failing to Object to the PSI*

Santos first contends that Mr. Thiros provided ineffective assistance by failing to object to the PSI report. (Def.'s § 2255 Mem., at 5).[7] Yet, Mr. Thiros *did* make three (3) vigorous objections to the PSI. First, Mr. Thiros argued against the PSI's representation of both the amount of time Santos had been part of the Bolita, (Sent. Tr. 52-53), and the amount of money involved in the gambling operation, (Sent. Tr. 53-54). Second, Mr. Thiros objected to sentence enhancements premised upon (what Santos believed to be) erroneous representations of the time Santos operated the Bolita and the amount of money involved in the Bolita's operation. Finally, Mr. Thiros took issue with "whether or not the money laundering or the gambling operation is the [offense] that the court should take into consideration in determining the appropriate guideline level." (Sent. Tr. 55-58). Not only did Mr. Thiros make these objections generally, he presented both testimonial and documentary evidence in support of his

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[7] The citation "Def.'s § 2255 Mem. at ___" references the Memorandum of Law attached to Santos' § 2255 motion in Cause No. 2:01 CV 638, at docket # 9.

objections at Santos' sentencing hearing.[8] Thus, the general claim that Mr. Thiros failed to make objections to the PSI is, in and of itself, false.

However, perhaps Santos' claim is not as general as it appears. Santos' Memorandum in Support of his § 2255 motion does not, in the section entitled "Ineffective Assistance of Counsel," specify to what exactly in the PSI Santos believes Mr. Thiros should have objected. (*See* Def.'s § 2255 Mem., at 5). Yet, in a previous section in his § 2255 motion, Santos argues that the PSI report was improperly prepared and inaccurate. In particular, Santos argues that the PSI inaccurately reported the maximum sentence permitted for his convictions under § 1956(a)(1)(A)(i)[9] and § 1956(h)[10] as twenty (20) years, when according to Santos, the correct maximum sentence is 46 to 57 months. (Def.'s § 2255 Mem., at 2-3). Thus, maybe Santos believes Mr. Thiros should have objected to this alleged inaccuracy.

However, § 1956(a)(1)(A)(i) *clearly* indicates that one who is found guilty of violating the statute "shall be sentenced to . . . *imprisonment for not more than*

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[8] In support of his objections to the PSI, Mr. Thiros first presented the testimony of two witnesses, Angel Morales, (Sent. Tr. 8-16), and Efrain Santos, (Sent. Tr. 34-48), and then submitted, as an exhibit, tax documents allegedly proving the year in which Santos became involved in the Bolita operation, (Sent. Tr. 40).

[9] For the text of § 1956(a)(1)(A)(i), *see supra* note 2.

[10] Section 1956(h) states, in pertinent part:

> Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

twenty years." (emphasis added). The maximum penalty for § 1956(h) is also *clearly* twenty (20) years in this instance. Indeed, § 1956(h) states:

> Any person who conspires to commit any offense defined in [§ 1956] . . . shall be subject to the *same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.*

(emphasis added). Thus, as the "object of the conspiracy" was the offense for which Santos was convicted under § 1956(a)(1)(A)(i), (*see* Indictment, at Count 3), then the appropriate penalty for conviction under § 1956(h) is a maximum of twenty (20) years. Therefore, the inaccuracy within the PSI that Santos suggests existed did not in fact exist, and Mr. Thiros cannot be found ineffective for failing to object to the PSI's correct representation of the penalty for the crimes of which Santos was convicted.

Santos also appears to believe that perhaps Mr. Thiros should have objected to the validity of a prior conviction used to enhance Santos' current sentence. (*See* Def.'s § 2255 Mem., at 4). Santos asserts that his 1966 conviction for "conspiracy to transfer and possess untaxed Marijuana," which was used to enhance his current sentence by three (3) points, is invalid because "courts have since ruled that no one is to be prosecuted for possession of untaxed marijuana." (Def.'s § 2255 Mem., at 4). Accordingly, Santos argues that his sentence should never have been enhanced based upon the invalid 1966 conviction, and presumably, Mr. Thiros should have raised this issue with the court. (Def.'s § 2255 Mem., at 4).

However, "the validity of prior convictions is not open to reexamination at sentencing for a new offense," *Talbott v. Indiana*, 226 F.3d 866, 870 (7th Cir. 2000); such is the case even if those prior convictions are used to enhance the sentence for the new offense, *id.* "This [general] rule is subject to *only one* exception: If an enhanced federal sentence will be based in part on a prior conviction obtained in violation of the right to counsel, the defendant may challenge the validity of his prior conviction during his federal sentencing proceedings. (citation omitted). *No other constitutional challenge to a prior conviction may be raised in the sentencing forum.* (citation omitted)." *Daniels v. United States*, 532 U.S. 374, 382, 121 S. Ct. 1578, 149 L. Ed. 2d 590 (2001) (emphasis added); *see also Talbott*, 226 F.3d at 870. Santos does not now allege, nor has he ever alleged, and there is no evidence to suggest, that Santos lacked counsel when convicted in 1966. Therefore, Santos fails to meet the one exception to the general rule that "sentencing hearings are not the appropriate forum to examine the validity of prior convictions even though such convictions may be used to enhance a present sentence." *United States v. Mitchell*, 18 F.3d 1355, 1358 (7th Cir. 1994). Consequently, Mr. Thiros did not render ineffective assistance by failing to object to the validity of Santos' 1966 conviction at Santos' latest sentencing; one can hardly be deemed ineffective for following the rules.[11]

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[11] Moving beyond the scope of Santos' ineffective assistance claim for just a moment, it is important to note that federal prisoners are generally *barred* from challenging a current sentence through a motion under § 2255 on the ground that the sentence was inappropriately enhanced by an allegedly invalid prior conviction. *See Daniels v. United States*, 532 U.S. 374, 382, 121 S. Ct. 1578, 149 L. Ed. 2d 590 (2001);

2. *Failing to Investigate Criminal Statutes*

Second, Santos claims that Mr. Thiros provided ineffective assistance by failing to investigate the criminal statues under which Santos was convicted. (Def.'s § 2255 Mem., at 5). Santos first argues that had Mr. Thiros investigated the criminal statutes listed in the Indictment, Mr. Thiros would have found that 18 U.S.C. § 371 is a "non-promulgated" statute. (Def.'s § 2255 Mem., at 6). Santos never explains what he means when he says § 371 is a "non-promulgated" statute, nor does he explain why or how this issue might be important to or affect his case. However, based upon the context in which the phrase "non-promulgated" appears, it seems Santos uses the phrase to mean that Congress has never "enacted," or rather, "executed" § 371, and therefore § 371 does not have the force of law. *See* Webster's New Int'l Dictionary 1816 (3d ed. 1981) ("Promulgate" is defined as: "b: to issue or give out (a law) by way of

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accord Ryan v. United States, 214 F.3d 877, 879-80 (7th Cir. 2000). Of course, this rule is also subject to the "lack of counsel" exception. *Daniels*, 532 U.S. at 382-83, 121 S. Ct. 1578 (defendant may, in a § 2255 proceeding, challenge a prior conviction used to enhance his current federal sentence if that prior conviction was imposed in violation of defendant's Sixth Amendment right to counsel). However, because "lack of counsel" claims are subject to procedural default rules, a defendant may generally only raise such a claim in his § 2255 motion "if he raised that claim at his federal sentencing proceeding." *Id.* at 382-83, 121 S. Ct. 1578 (citations omitted). In any event, as discussed above, Santos does not now allege, nor has he ever alleged, and the evidence does not suggest, that his 1966 conviction was imposed in violation of his Sixth Amendment right to counsel. As a consequence, Santos may not now appropriately challenge the imposition of the enhancement to his current sentence by collaterally attacking the validity of his 1966 conviction which supported that enhancement.

putting into execution."). If this is in fact what Santos means, then he is wrong. Section 371 was indeed "promulgated," or rather, "enacted" by Congress in 1948, and it does carry the force of law. *See* Act of June 25, 1948, ch. 645, 62 Stat. 701, *amended by* Violent Crime Control and Law Enforcement Act of 1994, Pub.L. No. 103-322, 108 Stat. 2147. Accordingly, Mr. Thiros was not ineffective for failing to investigate the non-issue of § 371's "promulgation."

Santos next argues that all sections of the Federal Criminal Code are only punishable in Washington, D.C. and the territories of the United States. (Def.'s § 2255 Mem., at 5-6). Therefore, Santos contends, not one of the statutes under which he was convicted was actually enforceable against him, and because Mr. Thiros failed to notice this, Mr. Thiros rendered ineffective assistance. (Def.'s § 2255 Mem., at 5-6). The Seventh Circuit has repeatedly refused to endorse this argument, calling it "frivolous and requir[ing] no further discussion." *United States v. Banks-Giombetti*, 245 F.3d 949, 953 (7th Cir. 2001) (refusing to discuss argument that federal government had no authority to prosecute bank robbery not committed on federal land); *United States v. Jones*, 983 F.2d 1425, 1428 & n. 6 (7th Cir. 1993) (calling "plainly frivolous" the argument that defendant was a citizen of the sovereignty of Texas and thus not subject to the jurisdiction of the United States on federal bond-jumping charges). Accordingly, this court will not endorse such an argument either.

3. *Failing to Object to Jurisdiction*

Lastly, Santos argues that Mr. Thiros was ineffective in failing to object to this court's jurisdiction over his criminal matter. (Def.'s § 2255 Mem., at 5-6). Pursuant

to 18 U.S.C. § 3231, this court has "original jurisdiction exclusive of the courts of the States, of all offenses against the laws of the United States." In the present case, Santos was charged with and convicted of violating 18 U.S.C. § 371 (conspiracy to conduct an illegal gambling business), 18 U.S.C. § 1955 (conducting an illegal lottery business), 18 U.S.C. § 1956(h) (conspiracy to use proceeds of an illegal gambling business to promote the carrying on of that business), and 18 U.S.C. § 1956(a)(1)(A)(i) (money laundering). Each of these offenses has been defined by Act of Congress as a crime against the laws of the United States. *See Pennsylvania v. Nelson*, 350 U.S. 497, 519, 76 S. Ct. 477, 100 L.Ed. 640 (1956) (Title 18 of the United States Code "codifies the federal criminal laws."). Therefore, this court unquestionably had jurisdiction over Santos' case, and Mr. Thiros was not ineffective in failing to object to a jurisdictional issue that did not exist.

B. *Excessive Sentence Claim*

Santos next contends that the court imposed upon him a sentence in excess of the maximum authorized by law. (Def.'s § 2255 Mot., at 5 ¶ B; Def.'s § 2255 Mem., at 2-3). Santos argues that the PSI inaccurately reported the maximum sentence permitted for his convictions under § 1956(a)(1)(A)(i) and § 1956(h) as twenty (20) years, when according to Santos, the correct maximum sentence is 46 to 57 months. (Def.'s § 2255 Mot., at 5 ¶ B; Def.'s § 2255 Mem., at 2-3). The court has already addressed the merit of this argument in the previous section, although it did so in the context of an ineffective assistance analysis. Nonetheless, no matter what context this argument is analyzed in, it must fail.

As the court explained above, § 1956(a)(1)(A)(i) clearly indicates that those who have engaged in conduct which violates the statute "shall be sentenced to . . . imprisonment for not more than twenty years." Section 1956(h) subjects those convicted under its provisions "to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy." Thus, given that the "object of the conspiracy" was the offense for which Santos was convicted under § 1956(a)(1)(A)(i), (*see* Indictment, at Count 3), § 1956(h), in this instance, also carries a maximum penalty of twenty (20) years.

Santos was sentenced to 210 months (17.5 years) for his conviction under § 1956(h), and 210 months for each of the two convictions under § 1956(a)(1)(A)(i) (all to be served concurrently). Accordingly, Santos did not receive a sentence in excess of the maximum authorized by law for the crimes of which he was convicted under § 1956(h) and § 1956(a)(1)(A)(i). Rather, he received two and one-half years less than the maximum. Thus, this court denies Santos' request to vacate his sentence based upon his contention that the penalties he received for his convictions under § 1956(h) and § 1956(a)(1)(A)(i) exceed the maximum prescribed by law; such a contention is simply false.

C. *Apprendi Claim*

Third, Santos argues that this court must vacate his sentence pursuant to *Apprendi*, 530 U.S. 466, 120 S. Ct. 2348. (Def.'s § 2255 Mot., at 6 ¶ 13; Def.'s § 2255 Mem., at 8-9). *Apprendi* ultimately requires that "[o]ther than the fact of a prior conviction, any fact which increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved

beyond a reasonable doubt." 530 U.S. at 490 (emphasis added).[12] Santos specifically asserts that this court violated *Apprendi* by wrongfully determining facts which resulted in a term of imprisonment fifteen (15) years beyond the prescribed statutory maximum of (what Santos argues is) five (5) years for his conviction under § 1956(h). (Def.'s § 2255 Mot., at 6 ¶ 13; Def.'s § 2255 Mem., at 8-9).

As this court has already explained several times over, Santos has simply got it wrong; the statutory maximum under § 1956(h) is NOT only five (5) years. Once again, § 1956(h) prescribes the "same penalties as those prescribed for the offense the commission of which was the object of the conspiracy." The object of the conspiracy in this case was the laundering of monetary instruments, the offense for which Santos was convicted under § 1956(a)(1)(A)(i). (*See* Indictment, at Count 3). As the statutory maximum under § 1956(a)(1)(A)(i) is twenty (20) years, then the statutory maximum under § 1956(h), in this instance, is also twenty (20) years. Thus, this court did not, as Santos contends, sentence Santos fifteen (15) years beyond the maximum number of years of imprisonment listed in § 1956(h). Nevertheless, ignoring for the moment that Santos' *Apprendi* claim is entirely based upon an incorrect understanding of the statutory maximum prescribed by § 1956(h), and

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[12] The rule announced in *Apprendi* is not applicable to sentences that became final *before* June 26, 2000, the date of *Apprendi*'s release. *Curtis v. United States*, 294 F.3d 841, 844 (7th Cir. 2002) ("*Apprendi* [ ] does not disturb sentences that became final before June 26, 2000, the date of its release."). However, as Santos' conviction became final approximately one (1) month *after* the date of *Apprendi*'s release, the rule announced in *Apprendi* may be appropriately applied to his case. *See id.*

assuming that Santos simply believes his case generally presents an *Apprendi* issue, the court notes that because Santos raises his *Apprendi* issue for the first time in a collateral attack on his conviction, he must now show *both* cause for failing to raise the issue at trial and on direct appeal, and prejudice resulting from that failure in order to avoid procedural default of the issue. *Galbraith*, 313 F.3d at 1006; *Mankarious*, 282 F.3d at 943.

Santos has not bothered to present any reasons for failing to raise his *Apprendi* issue in previous proceedings. Therefore, Santos has not demonstrated the "cause" necessary to avoid procedural default. Certainly, one might logically ask how it is that Santos could have presented his *Apprendi* claim before the instant proceeding considering that his conviction became final on July 14, 2000, only one (1) month after *Apprendi* was decided. The Court of Appeals has observed, however, that the "foundation for *Apprendi* was laid long before 1992," and that defendants have been "making *Apprendi*-like arguments ever since the Sentencing Guidelines came into being." *United States v. Smith*, 241 F.3d 546, 548 (7th Cir. 2001). In other words, nothing stopped Santos from making an "*Apprendi*-like" argument before this collateral proceeding, and his failure to do so is the forfeiture that leads to a cause and prejudice requirement.

Of course, given that *Apprendi*-like arguments have, apparently, long been in existence, it would seem that perhaps Santos might, or even should be able to raise a claim of ineffective assistance based upon his attorney's failure to raise an *Apprendi*-like argument on Santos' behalf at some point during Santos' criminal pro-

ceedings; an ineffective assistance claim could ultimately serve as "cause" for procedural default purposes, *see Murray v. Carrier*, 477 U.S. 478, 488-89, 106 S. Ct. 2639, 91 L .Ed. 2d 397 (1986) ("Ineffective assistance of counsel . . . is cause for a procedural default."). Yet, the Court of Appeals has noted on more than one occasion that a claim that counsel was ineffective for failing to anticipate *Apprendi* is untenable because "[t]he Sixth Amendment does not require counsel to forecast changes or advances in the law." *Lilly v. Gilmore*, 988 F.2d 783, 786 (7th Cir. 1993); *see also Valenzuela v. United States*, 261 F.3d 694, 700 (7th Cir. 2001); *Smith*, 241 F.3d at 548. The lack of *any* reasonable legal basis for raising a claim can be "cause," *Reed v. Ross*, 468 U.S. 1, 16, 104 S. Ct. 2901, 82 L. Ed. 2d 1 (1984), but, as noted above, the Court of Appeals has already determined that the foundation for *Apprendi* was apparent well before 1992. *Smith*, 241 F.3d at 548. As a result, Santos cannot establish "cause" excusing the forfeiture of his *Apprendi* claim. *See Bousley v. United States*, 523 U.S. 614, 622-23, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998); *Smith*, 241 F.3d at 548. Thus, Santos' *Apprendi* claim must fail. *See Mankarious*, 282 F.3d at 943 ("An issue not raised on direct appeal is barred from collateral review absent a showing of *both* good cause for and actual prejudice resulting from the failure to assert it.") (emphasis added).[13]

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[13] This court suspects that Santos (and anyone in his shoes) might feel that the precedent discussed above puts him between a rock and a hard place. On the one hand, Santos must show cause for failing to make an *Apprendi*-like argument because *Apprendi's* foundation was apparent. On the other hand, his attorney's apparent failure to notice and build on that foundation is not ineffectiveness constituting "cause" because attorneys are not required to forecast changes in the law. Perhaps this

D. *Scialabba Claim*

Finally, Santos contends that the Seventh Circuit's opinion in *Scialabba,* 282 F.3d 475, decided subsequent to Santos' direct appeal, requires that his money laundering convictions under § 1956(a)(1)(A)(i) and § 1956(h) be set aside and that he be re-sentenced. (*See generally* Def.'s Reply). The relevant facts of *Scialabba,* as the government notes, are "amazingly similar" to those of Santos' case. (Gov't Resp., at 22). Indeed, like Santos, defendant Scialabba, along with his co-defendant Cechini, ran an illegal gambling business. *Scialabba,* 282 F.3d at 475. Their business ultimately involved providing video poker machines to bars, restaurants, etc. *Id.* Bar/restaurant patrons would play the poker machines, and when they won, patrons could, if they so chose, (lawfully) use their winning video credits to continue playing video poker, or they could (unlawfully) redeem their video credits for cash. *Id.* at 475-76. Scialabba and Cechini used the contents of the video poker coin boxes (filled with the money of video poker players) to compensate bar/restaurant owners for their role in the business and for any payments made to winning customers, and to fix or replace broken or confiscated video poker machines. *Id.* at 476. As a result of Scialabba's and Cechini's activities—in particular, their

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seeming contradiction can be explained by noting that an effective attorney must choose the best issues to pursue on appeal, and is not ineffective for failing to pursue every non-frivolous issue. *Mason v. Hanks,* 97 F.3d 887, 893 (7th Cir. 1996). In this vein, an attorney cannot be expected to argue for reversal of e very negative precedent. Thus, unless an issue looming on the horizon is so obvious that no attorney in his or her right mind would fail to raise it, an attorney's failure to argue for a change or advance in the law should always be deemed a valid strategic choice, whether or not consciously pursued.

act of sharing the contents of the coin boxes with bar/restaurant owners and their use of video poker revenues to lease and fix equipment—they, like Santos, were convicted of money laundering under § 1956(a)(1)(A)(i). *Id.*

The over-arching question presented by *Scialabba* was whether the term "proceeds," as used in § 1956(a)(1),[14] "refers to the gross income from an offense, or only the net income." *Id.* at 475. The Court determined that the money laundering convictions of the *Scialabba* defendants "depend[ed] on the proposition that gross income is proceeds under [§ 1956]." *Id.* at 476. This determination sprang from the government's argument that Scialabba and Cechini violated the plain meaning of § 1956 by sharing the money collected from the gambling machine coin boxes with bar/restaurant owners and by using the coin box monies to meet the expenses of their gambling business (i.e., by leasing video poker machines and/or obtaining amusement licenses). *Id.* The Court equated such an argument with "saying that every drug dealer commits money laundering by using the receipts from sales to purchase more stock in trade, that a bank robber commits money laundering by using part of the loot from one heist to rent a getaway car for the next, and so on." *Id.*

The Court ultimately thought that "[t]reating the word [proceeds] as a synonym for receipts could produce odd outcomes." *Id.* at 477. It reasoned as follows:

> Consider a slot machine in a properly licensed casino. Gamblers insert coins, and the machine itself

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[14] For the text of § 1956(a)(1)(A)(i), *see supra* note 2.

returns some of them as winnings. Later the casino opens the machine and removes the remaining coins. What are the "proceeds" of this one-armed bandit: what's left in the cash box, or the total that entered through the coin slot? At oral argument the prosecutor sensibly replied that the "proceeds" do not exceed what's left after gamblers have received their jackpots; yet the only difference between the slot machine and the video poker machine is that the slot machine is automated and pays gamblers directly. Likewise, one would suppose, the "proceeds" of drug dealing are the *profits* of that activity (the sums available for investment outside drug markets), the net yield rather than the gross receipts that must be used to buy inventory and pay the wages of couriers. It would have been easy enough to write "receipts" in lieu of "proceeds" in § 1956(a)(1); the Rule of Lenity counsels against transmuting the latter into the former and catching people by surprise in the process.

. . . If [ ] the word "proceeds" is synonymous with gross income, then we would have to decide whether, as a matter of statutory construction (distinct from double jeopardy), it is appropriate to convict a person of multiple offenses when the transactions that violate one statute necessarily violate another. (citations omitted). By reading § 1956(a)(1) to cover only transactions involving profits, we curtail the overlap and ensure that the statutes may be applied independently to sequential steps in a criminal enterprise.

Id. (all marks and italics in original). In the end, the *Scialabba* Court held that "at least when the crime

entails voluntary, business-like operations, 'proceeds' must be *net income;* otherwise the predicate crime merges into money laundering (for no business can be carried on without expenses) and the word 'proceeds' loses operational significance." *Id.* at 475 (emphasis added). As a consequence of this holding, the *Scialabba* Court vacated the money laundering convictions of Scialabba and Cechini (after all, as noted above, the convictions of the *Scialabba* defendants had depended upon the proposition that gross income was proceeds under the statute). *Id.* at 476, 478.

It is this decision that has prompted Santos to argue that his money laundering convictions can no longer stand. Santos wonders how it can be that his use of gambling "proceeds" to pay both winning customers and money collectors constituted money laundering, *see Febus,* 218 F.3d at 790, while the remarkably similar acts of Scialabba and Cechini, which involved compensating bar owners for payments to winners and for their compliance in the gambling scheme, did not constitute money laundering, *see Scialabba,* 282 F.3d at 476-78. Santos ultimately argues that the *Scialabba* decision (and its interpretation of § 1956(a)(1)) is now the "law of the circuit." (Def.'s Reply, at 9). Thus, Santos contends, this court must apply that law to his case and set aside his money laundering convictions. (Def.'s Reply, at 9).[15]

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[15] The court thinks it important to note that Santos' reply brief did not clearly set forth Santos' arguments, nor did it provide this court with ANY law supporting his position. Rather, the brief matter-of-factly states that *Scialabba* applies to Santos' case and then goes on to attack the government's brief writing without ever really explaining why the government's position is (presumably) incorrect. Were Santos currently proceeding *pro se*, this court could forgive the deficiencies in his brief, but he is not. The court reminds Santos' attorneys that it is

The government responds rather simply by arguing that the *Scialabba* decision does not impact, or does not control the decision in Santos' case because *Scialabba* did not overrule the holding in *Febus*. (Gov't Resp., at 26-29).[16] The government supports this argument first by noting that in order for the decision of one panel to overrule that of another, the panel deciding the more recent case must, pursuant to Rule 40(e) of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit [hereinafter Cir. Rule 40(e)],[17] "recog-

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their job to clearly and concisely present their client's position and to support that position with law.

[16] The government also argues, in the alternative, that the Seventh Circuit simply "got it wrong" in *Scialabba*. The government asserts: (1) that interpreting the term "proceeds" as *net* proceeds "is contrary to the word's most common and primary meaning;" (2) that such an interpretation will severely hamper federal efforts to curtail organized crime, drug trafficking and business fraud; and, (3) that the Court's interpretation of "proceeds" departs from the approach of other Courts of Appeals. (Gov't Resp., at 30-43). The court shall not address these arguments however, as this court cannot "underrule" the Seventh Circuit. *Donohoe v. Consol. Operating & Prod. Corp.* 30 F.3d 907, 910 (7th Cir. 1994) ("Ours is a hierarchical judiciary, and judges of inferior courts *must* carry out decisions they believe mistaken."). Such arguments are better presented to the Court of Appeals itself.

[17] Circuit Rule 40(e) states:

> **Rehearing Sua Sponte Before Decision.** A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted. In the discretion of the panel, a proposed opinion which would establish a new rule or procedure may be similarly circulated before it is issued. When the position is adopted by the panel after compliance with this procedure, the opinion, when

nize the prior decision which it seeks to overrule, and circulate the new proposed opinion to the full court prior to the issuance of the new opinion." (Gov't Resp., at 26-27). The government then points out that there is no evidence to suggest that the *Scialabba* panel followed the requirements of Cir. Rule 40(e), and therefore, "clearly *Scialabba* was not meant to overrule [Santos' case]." (Gov't Resp., at 28). Thus, the government contends, "Santos' case is still good law;" and accordingly, this court must abide by that law. (Gov't Resp., at 29).

It may be that the *Scialabba* panel did not follow the dictates of Cir. Rule 40(e) in this case,[18] but this court is unsure why that matters considering that *Scialabba* and *Febus* did not decide the same question. Indeed, while the *Scialabba* Court concerned itself with the interpretation of the term "proceeds," as used in § 1956(a)(1), the *Febus* Court was not asked to, and therefore did not decided *anything* about the term "proceeds."[19]

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published, shall contain a footnote worded, depending on the circumstances, in substance as follows:

This opinion has been circulated among all judges of this court in regular active service. (No judge favored, or a majority did not favor) a rehearing en banc on the question of (e.g., overruling *Doe v. Roe.*)

[18] At least there is not any evidence to suggest that the *Scialabba* Court followed the dictates of Cir. Rule 40(e) in this particular instance.

[19] In *United States v. Febus*, the parties did not argue over the make-up of "proceeds" (as that term is used in § 1956(a)(1)). 218 F.3d 784, 789 (7th Cir. 2000). Rather, both parties appear to have assumed that "proceeds" equal gross receipts. *Id.* Indeed, from this assumption sprang Santos' argument that his use of illegal "proceeds" to pay the Bolita's collectors and winners merely completed the substantive offense of illegal gambling, and thus did not "promote the carrying on" of the

Consequently, there was *nothing* for *Scialabba* to overrule [20] in *Febus*. Therefore, it seems to this court that Cir. Rule 40(e) is irrelevant to the discussion at hand.

Ultimately, this case is not, as the government would like this court to believe, about whether one case "overrules" another, or whether *Febus* remains "good law." Rather, the real question here is whether Santos, as a prisoner collaterally attacking his conviction, is entitled to the benefit of the *Scialabba* Court's interpretation of "proceeds," (as used in § 1956(a)(1)), which came after Santos' convictions under § 1956(a)(1) had become final. The answer to this question appears to be "yes," Santos is so entitled.

Courts have long allowed defendants collaterally attacking their conviction the benefit of decisions which give the federal criminal statute under which they were convicted a more narrow reading than had previously been applied at the time of their conviction. *See Schriro v. Summerlin*, 542U.S. 348, 124 S. Ct. 2519, 2522, 159 L. Ed. 2d 442 (2004) ("New *substantive* rules generally apply retroactively [on collateral review]. This includes decisions that narrow the scope of a criminal statute by interpreting its terms.") (citation omitted) (emphasis in original); *Bousley*, 523 U.S. at 619-20, 118 S. Ct. 1604 (new interpretations of criminal statutes made after a

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Bolita in violation of § 1956(a)(1)(A)(i). *Id.*

[20] "A judicial decision is said to be overruled when a later decision, rendered by the same court or by a superior court in the same system, *expresses a judgment upon the same question of law* directly opposite to that which was before given, thereby depriving the earlier opinion of all authority as a precedent." Black's Law Dictionary 1104 (6th ed. 1990) (emphasis added).

defendant's conviction under that statute are retroactive on collateral review); *Lanier v. United States*, 220 F.3d 833, 838 (7th Cir. 2000) (noting defendant was entitled, even on collateral review, to the benefit of Court's interpretation of a term in 21 U.S.C. § 848 made after defendant's conviction under § 848 had become final); *United States v. Ryan*, 227 F.3d 1058, 1062-63 (8th Cir. 2000) (determining that when the Supreme Court narrows the interpretation of a criminal statute enacted by Congress, that interpretation may be applied retroactively to § 2255 claims for post-conviction relief); *United States v. Barnhardt*, 93 F.3d 706, 708 (10th Cir. 1996) (Supreme Court decision defining substantive reach of criminal statute can be applied retroactively to cases on collateral review). The rationale behind such a policy begins with the idea that "a statute, under our system of separate powers of government, *can have only one meaning.*" *Brough v. United States*, 454 F.2d 370, 372-73 (7th Cir. 1971) (emphasis added); *accord Bousley*, 523 U.S. at 620-21, 118 S. Ct. 1604 ("[U]nder our federal system it is only Congress, and not the courts, which can make conduct criminal.") (citation omitted). In other words, when a court interprets the scope of an existing criminal statute, that interpretation effectively serves as a declaration of what the statute has always meant. *Gates v. United States*, 515 F.2d 73, 78 (7th Cir. 1975). Certainly, if it were any other way, if a statute had a new meaning every time a court saw fit to interpret it, the result would ultimately be that acts covered by the statute might be criminal one day but not the next, and persons committing those acts may or may not be subject to prosecution and imprisonment depending on whether they committed the act pre-interpretation, post-interpretation, or somewhere in-between.

In any event, considering that a statute can have only one meaning from the date of its effectiveness onward (unless of course, the language of the statute has actually been changed by Congress), then where a court narrows the scope of a statute under which a federal prisoner was previously convicted, there exists the possibility that the prisoner now stands convicted of an act that the law never made criminal. *Bousley*, 523 U.S. at 620, 118 S. Ct. 1604. Thus, as it would be wholly contrary to our notions of justice and fairness to allow a defendant to serve a prison term for an act that is not, nor ever was a crime, defendants collaterally attacking their conviction are therefore entitled to the benefit of decisions which give a federal criminal statute a more narrow reading than had previously been applied to their own conviction under that statute. *Schriro*, 124 S. Ct. at 2522-23; *Bousley*, 523 U.S. at 619-20, 118 S. Ct. 1604; *Lanier*, 220 F.3d at 838; *Ryan*, 227 F.3d at 1062-63; *Barnhardt*, 93 F.3d at 708.[21]

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[21] As is obvious, many of the cases cited here discuss the application of a post-conviction statutory interpretation to habeas proceedings in terms of "retroactivity." In using the term "retroactive" or "retroactivity," such cases seem to imply that a court's interpretation of a statute somehow *changes* the law. Yet, this is simply not the case as a statute does not mean one thing pre-interpretation and then something entirely different post-interpretation. *Gates v. United States*, 515 F.2d 73, 78 (7th Cir. 1975). Ultimately, it seems that many courts discuss statutory cases (like the instant action) in terms of "retroactivity" because it is simply the easiest way to describe the situation at hand. However, even those courts that approach statutory cases in such a manner note that the implications for retroactivity analysis are quite different from those cases in which a new rule of criminal procedure is announced. *See, e.g.*, *Woodruff v. United States*, 131 F.3d 1238, 1242 (7th Cir. 1997) ("When the Supreme Court is announcing what an existing statute has meant all along, the implications for retroactivity analysis are quite different from the case in which it is announcing for the first time another

Returning to the case at hand, the fact that the Seventh Circuit only recently interpreted the term "proceeds" in § 1956(a)(1), does not mean that § 1956(a)(1) now means something entirely different than it did before the Court's interpretation. *Gates*, 515 F.2d at 78 ("A statute does not mean one thing prior to . . . interpretation and something entirely different afterwards."). Rather, the *Scialabba* Court's interpretation of "proceeds" as *net* receipts (versus *gross* receipts) was the law of this Circuit, properly interpreted, at the time of Santos' conviction; it is only that *Scialabba* presented the Seventh Circuit with the first opportunity, since the statute became effective, to decide the question of what constitutes "proceeds." Because the Seventh Circuit's determination that the term "proceeds" only refers to *net* proceeds effectively narrows the interpretation previously applied in Santos' case, there exists the distinct possibility that Santos stands convicted of acts that the law does not make criminal. Thus, Santos is entitled to the benefit of the *Scialabba* Court's interpretation of "proceeds" (as used § 1956(a)(1)), in this collateral proceeding. *See Bousley*, 523 U.S. at 619-20, 118 S. Ct. 1604; *Lanier*, 220 F.3d at 838; *Ryan*, 227 F.3d at 1062-63; *Barnhardt*, 93 F.3d at 708.

Consequently, in order for Santos to be guilty of money laundering under the *Scialabba* Court's interpretation of "proceeds," the money used by Santos in the financial transactions between himself and his couriers and/or winners for purposes of promoting his gambling business must have derived from the *net* proceeds of his

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implication of the provisions of the Constitution that bear on criminal procedure.").

illegal gambling business. Although Santos did admit that he used *proceeds* (generally) from his gambling business to pay the winners of his Bolita and to pay for the services of his couriers, the constitution of those proceeds (net versus gross) was never determined. *See Febus*, 218 F.3d at 789-90.[22] Nevertheless, after the opinion in *Scialabba*—in which the Seventh Circuit vacated money laundering convictions originally won on facts that, even the government admits, are "indistinguishable" from those presented in Santos' case, (*see* Gov't Resp., at 26)—it clearly appears that the proceeds admittedly used by Santos to pay winners and couriers *could only have been gross* proceeds, *cf. Scialabba*, 282 F.3d at 476 (Court determined that the money laundering convictions of the *Scialabba* defendants, which were based in part upon coin box payments made to bar/restaurant owners, must have depended on "the proposition that gross income is 'proceeds' under the statute."). In using *gross* proceeds from his Bolita to pay couriers and winners, Santos did not, pursuant to the proper interpretation of "proceeds" espoused by the *Scialabba* Court, violate § 1956(a)(1). *See id.* at 478 ("We now hold that the word 'proceeds' in § 1956(a)(1) denotes net rather than gross income of an unlawful venture."). Thus, Santos is currently imprisoned for acts that are not now, nor ever have been crimes. Accordingly, this court hereby **VACATES** Santos' money laundering convictions under § 1956(a)(1)(A)(i) and under § 1956(h).

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[22] The Court did not determine the character of the proceeds used by Santos to pay winners and couriers because it was never asked to do so. Ultimately, all parties participating in Santos' case seemingly proceeded on the theory that "proceeds" equal gross receipts. *Febus*, 218 F.3d at 789; *see also supra* note 19 and accompanying text.

IV. CONCLUSION

For the foregoing reasons, Santos' Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 is hereby **GRANTED IN PART**. Efrain Santos' money laundering convictions under § 1956(a)(1)(A)(i) and under § 1956(h) are **VACATED**. Santo's § 2255 motion is otherwise denied.

This case is hereby set for a status hearing in front of the undersigned on November 4, 2004, at 11:00 a.m. The court **STAYS** the effect of this order until the November 4 hearing.

SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

No. 2:01 CV 501
(arising from No. 2:96 CR 44)

UNITED STATES OF AMERICA, PLAINTIFF

v.

BENEDICTO DIAZ,DEFENDANT

ORDER

This matter is before the court on a Motion for Reconsideration pursuant to FED. R. CIV. P. 59(e) filed by defendant Benedicto Diaz ("Diaz") on September 17, 2001. In his FED. R. CIV. P. 59(e) motion, Diaz requests that this court reconsider its August 24, 2001 Order summarily denying his Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255. The government filed its response to Diaz's FED. R. CIV. P. 59(e) motion on June 9, 2003. Diaz then promptly filed a reply on July 15, 2003. After reviewing all of the materials submitted in this matter, the court, for the following reasons, **GRANTS** Diaz's FED. R. CIV. P. 59(e) motion **IN PART**. As a consequence of this court's decision concerning Diaz's FED. R. CIV. P. 59(e) motion, this Order also addresses the merit of Diaz's § 2255

motion, which, for the following reasons, shall also be **GRANTED IN PART.**

I. BACKGROUND

The long story of the instant action filed by defendant Diaz begins in East Chicago, Indiana with a man named Efrain Santos ("Santos") who ran an illegal gambling enterprise known as a "Bolita." Santos began operating his East Chicago Bolita in the 1970's[1] and continued to do so until approximately 1994. There was a brief period in the late 1970's and early 1980's when Santos was absent from the Bolita business, and during that time, Santo's brother, Roberto Febus (a.k.a. Bobby Santos), served as the Bolita's interim leader. (Tr. 1548-49). However, Santos returned in 1984.

The winning numbers in Santos' Bolita were based upon the daily Pick Three and Pick Four Illinois lottery games, and upon the Puerto Rican Lottery. (Tr. 733-34). Santos had runners accept bets for his Bolita primarily in bars and restaurants in East Chicago. (Tr. 587, 620-21, 734-35). The runners would take a commission of 15-25% from the bet money, (Tr. 738-39, 909), and then deliver the betting slips and the remaining bet money to "collectors," (Tr. 735-36, 740, 747, 1397-98, 1404, 1414). This is where defendant Diaz makes his entrance into the story as Diaz began acting as one of Santos' "collectors" in the mid-1980's. (Tr. 733, 735-36). The main thrust of Diaz's job was to deliver the slips and bet money to Santos. (Tr. 740-41). However, before Diaz

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[1] Before he began operating the Bolita in East Chicago, Indiana, Santos worked for Ken Eto, who ran a Bolita spanning both Illinois and Indiana in the late 1960's and early 1970's. (Tr. 1547-48). It appears Santos took over the Indiana portion of Eto's operation sometime in the early 1970's. (Tr. 1547-48).

made his deliveries, he would often take his "salary" out of the collected bet money, (Tr. 755-56), and on occasion would pay Bolita winners who won $100.00 or less, (Tr. 739).[2]

The FBI began investigating Santos' Bolita in 1992, (Tr. 138-39), and on March 30, 1993, the FBI executed search warrants for Santos' person, his house, his apartment and vehicle, as well as for the persons and vehicles of Diaz and another collector, (Tr. 209-10, 463). From their search, the FBI found betting slips, ledgers, cash and other evidence of Santos' gambling enterprise. (*See, e.g.,* Tr. 209-14, 464-66, 562, 852-55, 1415). After the FBI's search, Santos closed down his Bolita, but only for a few weeks, (Tr. 747, 1420); operations soon resumed, although the location and collection method for the Bolita had changed, (Tr. 747-48, 1419-20).

The FBI continued its surveillance of Santos' Bolita and conducted another search on June 22, 1993, (Tr. 221, 466), which returned further evidence of Santos' illegal gambling enterprise, (*see, e.g.*, Tr. 221-23, 466-67, 562, 855-56). This second search did not faze Santos, and the Bolita continued running without interruption. (Tr. 1429). The FBI then executed a third search on October 12, 1993, in which it again found betting sheets, betting slips, cash and other evidence of Santos' illegal Bolita. (*See, e.g.*, Tr. 576-77).

All of the evidence collected in the many raids on Santos' Bolita resulted in a ten (10) count Indictment against not only Santos, but also against Diaz and several other men all in some way connected to the illegal gambling enterprise. (*See* Indictment in Cause

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[2] Santos reportedly paid the Bolita's "big" winners himself. (Tr. 739, 1427).

No. 2:96 CR 44, at docket # 1 [hereinafter Indictment]). As it relates to the instant action, the Indictment charged defendant Diaz with: (1) conspiracy to conduct an illegal gambling business in violation of 18 U.S.C. § 371; (2) conducting an illegal lottery business in violation of 18 U.S.C. § 1955; (3) conspiracy to use the proceeds of an illegal gambling business to promote the carrying on of that illegal gambling business in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and 18 U.S.C. § 1956(h); and, (4) money laundering to promote an illegal gambling business in violation of 18 U.S.C. § 1956(a)(1)(A)(i). (Indictment, at Counts 1-4).

Originally pleading "not guilty" to the crimes charged, Diaz later accepted the terms of a Plea Agreement. (*See* Def.'s Pet. to Enter Change of Plea in Cause No. 2:96 CR 44, at docket # 188 [hereinafter Plea Agreement]). In pleading guilty to the crime of conspiring to use the proceeds of an illegal gambling business to promote the carrying on of that business in violation of § 1956(a)(1)(A)(i)[3] and § 1956(h)[4], Diaz freely

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[3] Section 1956(a)(1)(A)(i) provides, in pertinent part:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—
>
> > (A)(i) with the intent to promote the carrying on of specified unlawful activity;
> >
> > * * *
>
> shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

[4] Section 1956(h) provides, in pertinent part:

admitted that he received payment for his "collecting" services by taking money directly out of the total collected bets, (Change of Plea Tr. 31-32); it was ultimately the admission of such facts that served as the basis for Diaz's conviction under § 1956(a)(1)(A)(i) and § 1956(h), (Change of Plea Tr. 32).[5] In exchange for Diaz's plea of guilty and for his "complete, truthful and candid information and testimony" at the trial of six of Diaz's co-defendants (who had pled not guilty), the government agreed to file a downward departure motion pursuant to United States Sentencing Guideline ("USSG") § 5K1.1. (Plea Agreement ¶ 9(i)). However, the Plea Agreement noted that should Diaz fail to provide complete, truthful and candid information and testimony, then the government would no longer be obligated to file the departure motion as promised, and Diaz would not be allowed to withdraw his guilty plea. (Plea Agreement ¶ 9(i)).

Before his sentencing, the government informed Diaz that it would not seek the downward departure as promised because it believed Diaz had failed to testify truthfully in accordance with his obligation to do so via his Plea Agreement. Consequently, Diaz moved to withdraw his plea of guilty. (*See* Def.'s Mot. Withdraw Plea of Guilty in Cause No. 2:96 CR 44, at docket # 351).

> Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

[5] At Diaz's change of plea hearing, the government noted that "the payment of [Diaz's]—basically, his salary, was the use of the specified unlawful activity money to further promote the specified unlawful activity." (Change of Plea Tr. 32).

After a hearing on the issue, this court denied Diaz's request to withdraw his plea of guilty, noting that Diaz's trial testimony was inconsistent with earlier statements made by Diaz under oath. (*See* Order dated June 4, 1998 in Cause No. 2:96 CR 44, at docket # 370). In the end, Diaz was sentenced to 108 months imprisonment and fined $5,000.00. (Minute Entry in Cause No. 2:96 CR 44, at docket # 413).

After receiving his sentence, Diaz promptly filed his Notice of Appeal on June 12, 1998. (*See* Notice of Appeal in Cause No. 2:96 CR 44, at docket # 417). On appeal, Diaz contested only this court's denial of his motion to withdraw his guilty plea. He argued that "since his testimony fuifilled his side of the bargain by assisting the convictions of his co-defendants, the government breached the [plea] agreement by failing to file a downward departure motion for him under § 5K1.1." *United States v. Febus*, 218 F.3d 784, 790 (7th Cir. 2000) (footnote omitted). The Court of Appeals rejected Diaz's argument and affirmed his conviction. *Id.* at 791.

On August 16, 2001, Diaz filed a motion requesting that this court vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. (Def.'s § 2255 Mot. in Cause No. 2:01 CV 501, at docket # 1 [hereinafter Def.'s § 2255 Mot.]). The undersigned engaged in the prescribed initial consideration, (*see* RULES GOVERNING SECTION 2255 PROCEEDINGS, RULE 4(b)), and summarily denied Diaz's motion on the basis that Diaz had waived his right to file such a motion through the following language in his Plea Agreement:

> I expressly waive my right to appeal my sentence on any ground, including any appeal right conferred by

> Title 18, United States Code, Section 3742. *I also agree not to contest my sentence or the manner in which it was determined in any post-conviction proceeding, including, but not limited to, a proceeding under Title 28, United States Code, Section 2255.* Plea Agreement ¶ 9(m) (emphasis added).

(*See* Order dated Aug. 24, 2001 in Cause No. 2:01 CV 501, at docket # 2).

Unhappy with this court's dismissal of his § 2255 motion, Diaz subsequently filed a motion for reconsideration under FED.R.CIV.P. 59(e). In his motion for reconsideration, Diaz first informs the court that, in (what appeared to be) direct contravention of an express promise in the Plea Agreement not to appeal his case, Diaz nonetheless filed an appeal with the Seventh Circuit. (Def.'s Mot. for Recons. in Cause No. 2:01 CV 501, at docket # 5 ¶ 2 [hereinafter Def.'s Mot. Recons.]). Diaz then argues that because the government failed to invoke the Plea Agreement's waiver as a defense to Diaz's appeal, the government has now forfeited its right to invoke the waiver of collateral attack as a defense to his § 2255 motion. (Def.'s Mot. Recons. ¶ 2).

On November 28, 2001, this court ordered the government to respond to Diaz's FED.R.CIV.P. 59(e) motion. (Order dated Nov. 28, 2001 in Cause No. 2:01 CV 501, at docket # 6). However, due to a long delay caused by several continuances arising out of the Seventh Circuit's decision in *United States v. Scialabba*, 282 F.3d 475 (7th Cir. 2002)—an opinion which the government originally suspected conflicted with the Seventh

Circuit's holding in *Febus*[6]—the government did not tender its response until June 9, 2003. (*See* Gov't Resp. in Cause No. 2:01 CV 501, at docket # 32 [hereinafter Gov't Resp.]). Diaz then filed his reply on July 15, 2003. (*See* Def.'s Reply in Cause No. 2:01 CV 501, at docket # 33 [hereinafter Def.'s Reply]).

II. DEFENDANT'S FED. R. CIV. P. 59(e) MOTION

A. *Standard of Review*

RULE 59(e) permits parties to file, within ten (10) days of the entry of a judgment, a motion to reconsider that judgment. FED.R.CIV.P. 59(e). Motions filed under this RULE are ultimately designed "to correct manifest errors of law or fact or to present newly discovered evidence." *Publishers Res., Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985). Therefore, a FED.R.CIV.P. 59(e) motion is not appropriately used for the purpose of rehashing old arguments or for presenting new arguments "that could and should have been presented to the district court prior to the judgment." *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996). The decision of whether to grant or deny a FED.R.CIV.P. 59(e) motion is entrusted to the "sound judgment" of the district court. *LB Credit Corp. v. Resolution Trust Corp.*, 49 F.3d 1263, 1267 (7th Cir. 1995).

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[6] *United States v. Febus*, 218 F.3d 784 (7th Cir. 2000), is the Seventh Circuit decision dispensing with not only the appeal filed by Diaz, but also the appeals filed by several of his co-defendants including Efrain Santos, the proprietor of the Bolita.

B. *Discussion*

In his FED.R.CIV.P. 59(e) motion, Diaz makes several arguments which he believes clearly demonstrate that this court committed manifest error in summarily denying his § 2255 motion. First, Diaz argues that because he was allowed to appeal his case before the Seventh Circuit, or rather because the government failed to assert that, pursuant to the Plea Agreement, Diaz had waived his right to appeal, the government has now forfeited its right to invoke the Plea Agreement's waiver of collateral attack as a defense to Diaz's § 2255 motion. (Def.'s Mot. Recons. ¶ 2). In other words, Diaz argues that the government cannot pick and choose which waiver in his Plea Agreement it shall uphold and which one it shall not; and therefore, by choosing not to invoke the defense of waiver at Diaz's appeal, the government effectively waived any defense of waiver based upon the Plea Agreement. (*See* Def.'s Mot. Recons. ¶ 2). Accordingly, Diaz contends that this court should not have summarily denied his § 2255 motion based on waiver, but rather must address the merits of his collateral attack. (Def.'s Mot. Recons. ¶ 2).

While a defense of waiver may certainly be waived, *McKnight v. Dean*, 270 F.3d 513, 515 (7th Cir. 2001), the government did not waive any such defense in the instant action. At his appeal, Diaz argued that he should be permitted to withdraw his plea of guilty because the government had breached the Plea Agreement by refusing to file a downward departure motion under USSG § 5K1.1. *Febus*, 218 F.3d at 790. Thus, in essence, Diaz's appeal presented the Seventh Circuit with a question concerning the *validity of his Plea Agreement*. As the waiver within Diaz's Plea Agreement *only*

precludes him from appealing his *sentence*, (*see* Plea Agreement ¶ 9(m)), Diaz was therefore perfectly free to appeal on the grounds he ultimately chose to appeal, *see Blacharski v. United States*, 215 F.3d 792, 793-94 (7th Cir. 2000) (where appellant only waived right to challenge sentence, he was free to appeal validity of plea agreement); *Bridgeman v. United States*, 229 F.3d 589, 591-92 (7th Cir. 2000) (language of plea agreement waiving right to challenge sentence did not preclude defendant from collaterally attacking his underlying conviction). More importantly, the government's decision to forgo asserting the Plea Agreement's waiver of appeal was entirely appropriate, *see Blacharski*, 215 F.3d at 793-94, and certainly does not now harm the government's ability to (properly) raise the defense of waiver against any collateral attack initiated by Diaz. Consequently, Diaz's argument that the government waived its right to assert waiver of collateral attack as a defense to his § 2255 motion must fail.

The rest of Diaz's FED.R.CIV.P. 59(e) motion simply reiterates all the arguments already made in his § 2255 motion. More particularly, defendant argues that: (1) the facts to which he pled guilty do not constitute money laundering, and therefore he is actually innocent of the crime for which he was convicted, (*compare* Def.'s Mot. Recons. ¶ 4 *with* Def.'s § 2255 Mot., at 19-22); (2) since he is not guilty of money laundering, his counsel was ineffective in allowing him to be sentenced in accordance with the Sentencing Guidelines pertaining to money laundering, (*compare* Def.'s Mot. Recons. ¶ 4 *with* Def.'s § 2255 Mot., at 27-30);[7] and, (3) the sentence

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[7] In essence, Diaz contends that while the facts to which he pled guilty clearly indicate that he is "guilty of participating in a gambling

enhancement he received for obstruction of justice was improper, (*compare* Def.'s Mot. for Recons. ¶ 4 *with* Def.'s § 2255 Mot., at 33-34). As stated above, a FED.R.CIV.P. 59(e) motion is not the proper vehicle for rehashing old arguments. *Moro*, 91 F.3d at 876. Yet, in this particular instance, Diaz's insistence upon repeating his claims brings to the court's attention an important fact that it inadvertently overlooked when denying Diaz's § 2255 motion based upon the waiver in his Plea Agreement. Indeed, Diaz's claim that the facts admitted in his plea of guilty do not establish the elements of money laundering (and therefore, that he is actually innocent of the crime for which he was convicted) is a challenge to Diaz' s conviction, or rather, a challenge to the factual basis which generated his criminal sentence. Such a challenge is not precluded by the waiver in Diaz's plea agreement which only addresses Diaz's right to contest his *sentence* in a collateral proceeding; the plea agreement remains silent as to whether Diaz may contest his *conviction*, (*see* Plea Agreement ¶ 9(m)).

Accordingly, this court erred in summarily denying Diaz's actual innocence claim based upon the waiver in his Plea Agreement. However, with regard to Diaz's challenge to the obstruction of justice enhancement and his claim of ineffective assistance, the court notes that both of these issues were properly dismissed; such

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enterprise," they do not support his money laundering conviction. (Def.'s § 2255 Mot., at 11). Accordingly, Diaz argues that his attorney should *not* have allowed the court to sentence him under those guidelines which concern the offense of money laundering, but rather should have ensured that he was sentenced under the "gambling guidelines" or, in the alternative, sentenced only for "the proceeds directly attributable to him, $90,000.00 or $180,0000 not $2 million." (Def.'s § 2255 Mot., at 23).

claims ultimately challenge the sentence Diaz received for his plea of guilty, and thus appear to run afoul of the waiver in his Plea Agreement, (*see* Plea Agreement ¶ 9(m)). Therefore, the court hereby **GRANTS** Diaz's FED.R.CIV.P. 59(e) motion **IN PART**, and shall proceed to review the merits of Diaz's actual innocence claim *only*.

III. DEFENDANT'S MOTION PURSUANT TO 28 U.S.C. § 2255

A. *Standard of Review*

"No prisoner has a constitutional entitlement to further review of the final judgment in a criminal case." *Farmer v. Litscher*, 303 F.3d 840, 844 (7th Cir. 2002) (citing *Freeman v. Page*, 208 F.3d 572, 576 (7th Cir. 2000)). However, with the enactment of 28 U.S.C. § 2255, Congress gave federal prisoners a right to launch a collateral attack against their conviction. Section 2255 ultimately grants the federal courts power "to vacate, set aside or correct the sentence" of a convicted prisoner, 28 U.S.C. § 2255 ¶ 1, but only if the prisoner is able to expose flaws in the conviction "which are jurisdictional in nature, constitutional in magnitude, or result in a complete miscarriage of justice," *Boyer v. United States*, 55 F.3d 296, 298 (7th Cir. 1995) (citation omitted). Thus, "relief under 28 U.S.C. § 2255 is reserved for extraordinary situations." *Prewitt v. United States*, 83 F.3d 812, 816 (7th Cir. 1996) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 633-34 (1993)).[8]

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[8] Emphasizing the social benefit of finality and advancing a jurisprudence of limited post conviction success, the United States Supreme Court has stated:

> Once the defendant's chance to appeal has been waived or ex-

A post-conviction proceeding under § 2255 "is not to be used as a substitute for a direct appeal." *United States v. Barger*, 178 F.3d 844, 848 (7th Cir. 1999) (citing *Theodorou v. United States*, 887 F.2d 1336, 1339 (7th Cir. 1989)); *accord Coleman v. United States*, 318 F.3d 754, 760 (7th Cir. 2003). Accordingly, the doctrine of procedural default precludes the district court from considering certain claims presented in a § 2255 motion that the defendant could have raised on direct appeal, unless the defendant "can show good cause for failing to raise the issue[s] and actual prejudice." *Galbraith v. United States*, 313 F.3d 1001, 1006 (7th Cir. 2002); *accord Mankarious v. United States*, 282 F.3d 940, 943 (7th Cir. 2002) ("An issue not raised on direct appeal is barred from collateral review absent a showing of both good cause for and actual prejudice resulting from the failure to assert it."). "A showing that a refusal to consider the issue would be a fundamental miscarriage of justice" may also aid a prisoner in attaining review of a procedurally defaulted issue. *Galbraith*, 313 F.3d at 1006 (internal quotation marks and citation omitted).

B. *Discussion*

Diaz seeks relief pursuant to § 2255 by claiming that the opinion expressed by the Seventh Circuit in *Scialabba*, 282 F.3d 475, renders him innocent of the crime for which he was convicted, and thus requires that

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hausted . . . [the court is] entitled to presume he stands fairly and finally convicted, especially when, as here, he already has had a fair opportunity to present his federal claims to a federal forum. Our trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless postconviction collateral attacks. To the contrary, *a final judgment commands respect*. *United States v. Frady*, 456 U.S. 152, 164-65 (1982) (emphasis added).

his conviction be set aside and that he be re-sentenced. Before the court addresses the merit of Diaz's claim, it is perhaps prudent to note here that Diaz's § 2255 motion does not actually mention the *Scialabba* decision by name in as far as *Scialabba* had not yet been decided when Diaz filed his motion to vacate pursuant to § 2255.[9] Rather, in his § 2255 motion Diaz merely argues that the facts to which he pled guilty did not establish the crime of money laundering, and therefore he was (and is) factually innocent of conspiring to use the proceeds of an illegal gambling business to promote the carrying on of that illegal gambling business in violation of § 1956(a)(1)(A)(i) and § 1956(h). (Def.'s § 2255 Mot., at 19-22).

It was ultimately the government who brought the *Scialabba* opinion to this court's attention and to the forefront of this § 2255 inquiry. Indeed, four (4) months after this court issued its November 28, 2001 Order requiring the government to respond to Diaz's FED.R.CIV.P. 59(e) motion, the government requested an extension of time in which to file its response because it believed the (then-recent) decision in *Scialabba* had the potential to not only impact the disposition of Diaz's FED.R.CIV.P. 59(e) motion, but more importantly, might also affect the claim of actual innocence Diaz had presented in his § 2255 motion. (*See* Gov't Mot. for Continuance in Cause No. 2:01 CV 501, at docket # 9).[10] In

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[9] Diaz filed his § 2255 motion on August 16, 2001, and *Scialabba* was not decided until early 2002.

[10] In its motion for an extension of time, the government argued that the Seventh Circuit's interpretation of money laundering in *United States v. Scialabba*, 282 F.3d 475 (7th Cir. 2002), directly contradicted its previous interpretation of money laundering in *Febus*, 218 F.3d 784 (the decision dispensing with the appeals of Diaz and several of his co-

any event, in the intervening time between the government's first request for an extension of time and its eventual response, both parties have agreed that the *Scialabba* decision does indeed directly tie onto the original claim of actual innocence presented by Diaz in his § 2255 motion. Consequently, the court shall address Diaz's claim of actual innocence within the framework of the *Scialabba* decision.

As Diaz's claim of actual innocence centers upon the Seventh Circuit's opinion in *Scialabba*, it is perhaps best to start this discussion by summarizing the facts of that case. Accordingly then, to begin with, the *Scialabba* action, like the case at hand, revolved around an illegal gambling business. *Scialabba*, 282 F.3d at 475. The business, run by two men, Scialabba and Cechini, involved providing video poker machines to bars, restaurants, etc. *Id.* Bar/restaurant patrons would play the poker machines, and when they won patrons could, if they so chose, (lawfully) use their winning video credits to continue playing video poker, or they could (unlawfully) redeem their video credits for cash. *Id.* at 475-76. *Scialabba* and *Cechini* used the contents of the video poker coin boxes (filled with the money of video poker players) to compensate bar/restaurant owners for their role in the business and for any payments made to winning customers, and to fix or replace broken or

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defendants). (Gov't Mot. for Continuance in Cause No. 2:01 CV 501, at docket # 9). Therefore, the government requested an extension of time to respond to Diaz's FED. R. CIV. P. 59(e) motion so that it might first review the *Scialabba* decision and consider its relationship with *Febus*, and then determine what impact (if any) the *Scialabba* decision had upon Diaz's conviction. (Gov't Mot. for Continuance in Cause No. 2:01 CV 501, at docket # 9).

confiscated video poker machines. *Id.* at 476. As a result of Scialabba's and Cechini's activities—in particular, their act of sharing the contents of the coin boxes with bar/restaurant owners and their use of video poker revenues to lease and fix equipment—they were convicted of money laundering under § 1956(a)(1)(A)(i). *Id.*

The over-arching question presented by *Scialabba* was whether the term "proceeds," as used in § 1956(a)(1),[11] "refers to the gross income from an offense, or only the net income." *Id.* at 475. The Court determined that the money laundering convictions of the *Scialabba* defendants "depend[ed] on the proposition that *gross* income is proceeds under [§ 1956]." *Id.* at 476 (emphasis added). This determination sprang from the government's argument that Scialabba and Cechini violated the plain meaning of § 1956 by sharing the money collected from the gambling machine coin boxes with bar/restaurant owners and by using the coin box monies to meet the expenses of their gambling business (i.e., by leasing video poker machines and/or obtaining amusement licenses). *Id.* The Court equated such an argument with "saying that every drug dealer commits money laundering by using the receipts from sales to purchase more stock in trade, that a bank robber commits money laundering by using part of the loot from one heist to rent a getaway car for the next, and so on." *Id.*

The Court ultimately thought that "[t]reating the word [proceeds] as a synonym for receipts could produce odd outcomes." *Id.* at 477. It reasoned as follows:

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[11] For the text of § 1956(a)(1), *see supra* note 3.

Consider a slot machine in a properly licensed casino. Gamblers insert coins, and the machine itself returns some of them as winnings. Later the casino opens the machine and removes the remaining coins. What are the "proceeds" of this one-armed bandit: what's left in the cash box, or the total that entered through the coin slot? At oral argument the prosecutor sensibly replied that the "proceeds" do not exceed what's left after gamblers have received their jackpots; yet the only difference between the slot machine and the video poker machine is that the slot machine is automated and pays gamblers directly. Likewise, one would suppose, the "proceeds" of drug dealing are the *profits* of that activity (the sums available for investment outside drug markets), the net yield rather than the gross receipts that must be used to buy inventory and pay the wages of couriers. It would have been easy enough to write "receipts" in lieu of "proceeds" in § 1956(a)(1); the Rule of Lenity counsels against transmuting the latter into the former and catching people by surprise in the process.

. . . If [ ] the word "proceeds" is synonymous with gross income, then we would have to decide whether, as a matter of statutory construction (distinct from double jeopardy), it is appropriate to convict a person of multiple offenses when the transactions that violate one statute necessarily violate another. (citations omitted). By reading § 1956(a)(1) to cover only transactions involving profits, we curtail the overlap and ensure that the statutes may be applied independently to sequential steps in a criminal enterprise.

Id. (all marks and italics in original). In the end, the *Scialabba* Court held that "at least when the crime entails voluntary, business-like operations, 'proceeds' must be *net income*; otherwise the predicate crime merges into money laundering (for no business can be carried on without expenses) and the word 'proceeds' loses operational significance." *Id.* at 475 (emphasis added). As a consequence of this holding, the *Scialabba* Court vacated the money laundering convictions of Scialabba and Cechini. *Id.* at 478.

Returning to the case at hand, Diaz argues that the *Scialabba* decision must "control" the outcome of his actual innocence claim. (Def.'s Reply, at 3). Defendant makes a neat (if somewhat legally superficial) comparison of his actual innocence claim to the claims and facts presented by *Scialabba*, and declares his case to be "indistinguishable" from *Scialabba*. (Def.'s Reply, at 3-5). He ultimately believes that the *Scialabba* decision makes very clear that the conduct which caused him to be convicted under § 1956(a)(1)(A)(i) and § 1956(h)—withdrawing his salary from the total collected bet money[12]—was not in fact criminal, (Def.'s Reply, at 3); after all, the *Scialabba* Court determined that the remarkably similar conduct committed by the *Scialabba* defendants—compensating bar owners from the total collected bet money for payments to winners and for their compliance in the gambling scheme—did not constitute money laundering, *Scialabba*, 282 F.3d at 476-78.

The government quite agrees that "*Scialabba* and Diaz's claim are indistinguishable in their facts . . . ."

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[12] *See supra* note 5.

(Gov't Resp., at 24). More importantly, the government seemingly admits that were this court to apply the *Scialabba* Court's decision (and thus its interpretation of "proceeds") to this § 2255 proceeding, then the act upon which Diaz was convicted would not actually constitute money laundering. (*See* Gov't Resp., at 24). However, the government contends that the *Scialabba* decision does not apply to this case. (Gov't Resp., at 25-27).

Instead, the government directs this court's attention to the Seventh Circuit's earlier decision in *Febus*, 218 F.3d 784, which dispenses with the appeals of Diaz and his co-defendants. (Gov't Resp., at 24). In particular, the government points to the *Febus* Court's discussion concerning the money laundering convictions under § 1956(a)(1)(A)(i) and § 1956(h) of Efrain Santos.[13] (Gov't Resp., at 24). In rejecting Santos' argument that "the evidence was insufficient to convict him of money laundering because his cash payments to the bolita's collectors and winners were essential transactions of the illegal gambling business, and thus cannot also constitute transactions under" § 1956(a)(1)(A)(i), the *Febus* Court stated:

> In this case, the government established that Santos reinvested the bolita's proceeds to ensure its continued operation for over 5 years, well beyond the 30 days required to complete the substantive offense of illegal gambling under 18 U.S.C. § 1955. Furthermore, [Santos'] own records show that the income to his bolita expanded from approximately $250,000.00

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[13] As noted above in Section I, Efrain Santos was the Bolita's proprietor and was indicted along with Diaz and several others.

> per year for the years 1989 to 1992, to $330,000.00 for 1993, and up to $410,000.00 for 1994. His payments to his collectors, Diaz and Morales, compensated them for collecting the increased revenues and transferring those funds back to him. And his payments to the winning players promoted the bolita's continuing prosperity by maintaining and increasing the players' patronage. (citation omitted). Therefore, the government produced sufficient evidence to enable a reasonable jury to find Santos guilty of money laundering beyond a reasonable doubt.

Febus, 218 F.3d at 789-90.

The government sets its focus upon *Febus* because it believes that the reasoning employed by the *Febus* Court in affirming Santos' money laundering convictions under § 1956(a)(1)(A)(i) and § 1956(h) control the fate of Diaz's current claim of actual innocence. (Gov't Resp., at 25-27). Indeed, the government contends that although *Scialabba* was decided after *Febus* (and appears, at least on the surface, to conflict with *Febus* in its interpretation of what constitutes money laundering), *Scialabba* never explicitly overruled *Febus*, and therefore *Febus* remains good law and must govern the outcome of Diaz's current claim of actual innocence. (Gov't Resp., at 25-27).[14] The government supports this

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[14] The government also argues that the Seventh Circuit's decision in *Scialabba* "is not well reasoned nor is it a proper interpretation of the promotion prong of the money laundering statute." (Gov't Resp., at 27). The government supports its general belief that the *Scialabba* Court "got it wrong" with several pages of interesting and well-thought-out arguments. However, the court shall not determine the merit of this portion of the government's brief, as this court cannot "underrule" the Seventh Circuit. *Donohoe v. Consol. Operating & Prod. Corp.* 30 F.3d

argument by first noting that in order for the decision of one panel to overrule that of another, the panel deciding the more recent case must, pursuant to RULE 40(e) of the CIRCUIT RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT [hereinafter CIR. RULE 40(e)],[15] "recognize the prior decision which it seeks to overrule, and circulate the new proposed opinion to the full court prior to the issuance of the new opinion." (Gov't Resp., at 25). The government then points out that there is no evidence to suggest that the *Scialabba* panel followed the requirements of CIR. RULE

907, 910 (7th Cir. 1994) ("Ours is a hierarchical judiciary, and judges of inferior courts *must* carry out decisions they believe mistaken . . .") (internal quotation marks and citation omitted) (emphasis added)). Such arguments are better presented to the Court of Appeals itself.

[15] CIRCUIT RULE 40 (e) states:

> **Rehearing Sua Sponte Before Decision.** A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted. In the discretion of the panel, a proposed opinion which would establish a new rule or procedure may be similarly circulated before it is issued. When the position is adopted by the panel after compliance with this procedure, the opinion, when published, shall contain a footnote worded, depending on the circumstances, in substance as follows:
>
> This opinion has been circulated among all judges of this court in regular active service. (No judge favored, or a majority did not favor) a rehearing en banc on the question of (e.g., overruling Doe v. Roe.)

40(e), and therefore, "*Scialabba* does not overrule [*Febus*]." (Gov't Resp., at 25).

The court has once before addressed this exact argument in an October 20, 2004 Order which discussed (and ultimately granted in part) the § 2255 claims made by Diaz's co-defendant Santos. As was the case in the instant action, the government initially raised the issue of *Scialabba* during Santos' § 2255 proceeding, and like Diaz does now, Santos argued that the *Scialabba* Court's understanding of the money laundering statute (given its interpretation of the term "proceeds") applied to his case, and therefore the actions for which he was convicted under § 1956(a)(1)(A)(i) and § 1956(h) did not actually constitute money laundering. And, like it does in the instant action, the government argued that *Scialabba* did not overrule *Febus*, and therefore requested that this court apply the *Febus* Court's interpretation of money laundering to Santos' claim of innocence under § 2255. This court disagreed with the government's position in Santos' § 2255 proceeding, and does so again in the instant action.

The reasoning this court employed in Santos' § 2255 proceeding to demonstrate error in the government's position that "*Scialabba* does not overrule [*Febus*]" and thus, "[*Febus*] remains good law," (Gov't Resp., at 25), applies equally to the matter at hand, and thus this court shall repeat it verbatim here:

> It may be that the *Scialabba* panel did not follow the dictates of CIR. RULE 40(e) in this case,[16] but this

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[16] At least there is not any evidence to suggest that the *Scialabba* Court followed the dictates of CIR. RULE 40(e) in this particular instance. *See generally Scialabba*, 282 F.3d 475.

court is unsure why that matters considering that *Scialabba* and *Febus* did not decide the same question. Indeed, while the *Scialabba* Court concerned itself with the interpretation of the term "proceeds," as used in § 1956(a)(1), the *Febus* Court was not asked to, and therefore did not decided *anything* about the term "proceeds."[17] Consequently, there was *nothing* for *Scialabba* to overrule[18] in *Febus*. Therefore, it seems to this court that CIR. RULE 40(e) is irrelevant to the discussion at hand.

Ultimately, the true issue in the instant action, as it was in Santos' case, is whether Diaz, as a prisoner collaterally attacking his conviction, is entitled to the benefit of the *Scialabba* Court's interpretation of the money laundering statute (with respect to the term "proceeds" as used in § 1956(a)(1)), which came after Diaz's conviction under that statute became final. And also as it was in Santos' case, the answer to this question appears to be yes. The court shall once again quote verbatim from its Order discussing Santos' § 2255

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[17] In *Febus*, the parties did not argue over the make-up of "proceeds"(as that term is used in § 1956(a)(1)). 218 F.3d at 789. Rather, both parties appear to have assumed that "proceeds" equal gross receipts. *Id.* Indeed, from this assumption sprang Santos' argument that his use of illegal "proceeds" to pay the Bolita's collectors and winners merely completed the substantive offense of illegal gambling, and thus did not "promote the carrying on" of the Bolita in violation of § 1956(a)(1)(A)(i). *Id.*

[18] "A judicial decision is said to be overruled when a later decision, rendered by the same court or by a superior court in the same system, *expresses a judgment upon the same question of law* directly opposite to that which was before given, thereby depriving the earlier opinion of all authority as a precedent." BLACK'S LAW DICTIONARY 1104 (6th ed. 1990) (emphasis added).

motion because the reasoning employed in applying *Scialabba* to Santos' case also applies here:

> Courts have long allowed defendants collaterally attacking their conviction the benefit of decisions which give the federal criminal statute under which they were convicted a more narrow reading than had previously been applied at the time of their conviction. *See Schriro v. Summerlin*, __ U.S. __, 124 S. Ct. 2519, 2522 (2004) ("New *substantive* rules generally apply retroactively [on collateral review]. This includes decisions that narrow the scope of a criminal statute by interpreting its terms.") (citation omitted) (emphasis in original)); *Bousley v. United States*, 523 U.S. 614, 619-20 (1998) (new interpretations of criminal statutes made after a defendant's conviction under that statute are retroactive on collateral review); *Lanier v. United States*, 220 F.3d 833, 838 (7th Cir. 2000) (noting defendant was entitled, even on collateral review, to the benefit of Court's interpretation of a term in 21 U.S.C. § 848 made after defendant's conviction under § 848 had become final); *United States v. Ryan*, 227 F.3d 1058, 1062-63 (8th Cir. 2000) (determining that when the Supreme Court narrows the interpretation of a criminal statute enacted by Congress, that interpretation may be applied retroactively to § 2255 claims for post-conviction relief); *United States v. Barnhardt*, 93 F.3d 706, 708 (10th Cir. 1996) (Supreme Court decision defining substantive reach of criminal statute can be applied retroactively to cases on collateral review). The rationale behind such a policy begins with the idea that "a statute, under our system of separate powers of government, *can have only one*

meaning." *Brough v. United States*, 454 F.2d 370, 372-73 (7th Cir. 1971) (emphasis added); *accord Bousley*, 523 U.S. at 620-21 ("[U]nder our federal system it is only Congress, and not the courts, which can make conduct criminal.") (citation omitted)). In other words, when a court interprets the scope of an existing criminal statute, that interpretation effectively serves as a declaration of what the statute has always meant. *Gates v. United States*, 515 F.2d 73, 78 (7th Cir. 1975). Certainly, if it were any other way, if a statute had a new meaning every time a court saw fit to interpret it, the result would ultimately be that acts covered by the statute might be criminal one day but not the next, and persons committing those acts may or may not be subject to prosecution and imprisonment depending on whether they committed the act pre-interpretation, post-interpretation, or somewhere in-between.

In any event, considering that a statute can have only one meaning from the date of its effectiveness onward (unless, of course, the language of the statute has actually been changed by Congress), then where a court narrows the scope of a statute under which a federal prisoner was previously convicted, there exists the possibility that the prisoner now stands convicted of an act that the law never made criminal. *Bousley*, 523 U.S. at 620. Thus, as it would be wholly contrary to our notions of justice and fairness to allow a defendant to serve a prison term for an act that is not, nor ever was, a crime, defendants collaterally attacking their conviction are therefore entitled to the benefit of decisions which give a federal criminal statute a more narrow reading than

had previously been applied to their own conviction under that statute. *Schriro*, 124 S. Ct. at 2522-23; *Bousley*, 523 U.S. at 619-20; *Lanier*, 220 F.3d at 708; *Ryan*, 227 F.3d at 1062-63; *Barnhardt*, 93 F.3d at 708.[19]

Thus, the fact that the Seventh Circuit only recently interpreted the term "proceeds" in § 1956(a)(1) of the money laundering statute, does not mean that the statute now means something entirely different than it did before the Court's interpretation. *Gates*, 515 F.2d at 78 ("A statute does not mean one thing prior to . . . interpretation and something entirely different afterwards."). Rather, the *Scialabba* Court's interpretation of "proceeds" as *net* receipts (versus *gross* receipts) was the law of this Circuit, properly interpreted, at the time of Diaz's conviction; it is only that

---

[19] As is obvious, many of the cases cited here discuss the application of a post-conviction statutory interpretation to habeas proceedings in terms of "retroactivity." In using the term "retroactive" or "retroactivity," such cases seem to imply that a court's interpretation of a statute somehow *changes* the law. Yet, this is simply not the case as a statute does not mean one thing pre-interpretation and then something entirely different post-interpretation. *Gates v. United States*, 515 F.2d 73, 78 (7th Cir. 1975). Ultimately, it seems that many courts discuss statutory cases (like the instant action) in terms of "retroactivity" because it is simply the easiest way to describe the situation at hand. However, even those courts that approach statutory cases in such a manner note that the implications for retroactivity analysis are quite different from those cases in which a new rule of criminal procedure is announced. *See, e.g.*, *Woodruff v. United States*, 131 F.3d 1238, 1242 (7th Cir. 1997) ("When the Supreme Court is announcing what an existing statute has meant all along, the implications for retroactivity analysis are quite different from the case in which it is announcing for the first time another implication of the provisions of the Constitution that bear on criminal procedure.").

Scialabba presented the Seventh Circuit with the first opportunity, since the statute became effective, to decide the question of what constitutes "proceeds." Because the Seventh Circuit's determination in *Scialabba* that the term "proceeds" only refers to *net* proceeds effectively narrows the interpretation of money laundering previously applied in Diaz's case, there exists the distinct possibility that Diaz stands convicted of acts that the law does not make criminal. Therefore, Diaz is entitled to the benefit of the *Scialabba* Court's interpretation of "proceeds" in this collateral proceeding. *See Bousley*, 523 U.S. at 619-20; *Lanier*, 220 F.3d at 838; *Ryan*, 227 F.3d at 1062-63; *Barnhardt*, 93 F.3d at 708.

Consequently, in order for Diaz to be guilty of conspiring to use the proceeds of an illegal gambling business to promote the carrying on of that illegal gambling business in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and § 1956(h), the money from which Diaz withdrew his salary must have derived from the *net* proceeds of the illegal gambling business run by Santos. *See Scialabba*, 282 F.3d at 475. However, after the opinion in *Scialabba*—in which the Seventh Circuit vacated money laundering convictions originally won on facts that, even the government admits, are "indistinguishable" from those presented by Diaz's actual innocence claim, (*see* Gov't Resp., at 24)—it clearly appears that the total collected bet monies from which Diaz admittedly withdrew his salary *could only have been gross* proceeds, *cf. Scialabba*, 282 F.3d at 476 (Court determined that the money laundering convictions of the *Scialabba* defendants, which were based in part upon payments made to bar/restaurant owners from collected coin box monies, must have depended on

"the proposition that gross income is 'proceeds' under the statute."). In using *gross* proceeds from the Bolita to commit the act for which he was convicted, Diaz could not have, given the proper interpretation of the money laundering statute espoused by the *Scialabba* Court, conspired to commit money laundering. Thus, Diaz is currently imprisoned for an act that is not now, nor ever was a crime. Accordingly, this court hereby **VACATES** Diaz's conviction for conspiring to use the proceeds of an illegal gambling business to promote the carrying on of that illegal gambling business in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and 18 U.S.C. § 1956(h).

IV. CONCLUSION

For the foregoing reasons, this court hereby **GRANTS** Diaz's Motion pursuant to FED. R. CIV. P. 59(e) **IN PART**, (docket # 5 in Cause No. 2:01 CV 501), reconsidering *only* his claim of actual innocence. This court also **GRANTS** Diaz's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 **IN PART**, (docket # 1 in Cause No. 2:01 CV 501), and consequently **VACATES** Diaz's conviction for conspiring to use the proceeds of an illegal gambling business to promote the carrying on of that illegal gambling business in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and 18 U.S.C. § 1956(h).

In accordance with this court's decision to **VACATE** Diaz's conviction for conspiring to use the proceeds of an illegal gambling business to promote the carrying on of that illegal gambling business in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and 18 U.S.C. § 1956(h), this court **ORDERS**:

(1) that the United States Bureau of Prisons release defendant Benedicto Diaz from its custody;

(2) that defendant Benedicto Diaz post a $20,000.00 unsecured bond for his release;

(3) that defendant Benedicto Diaz report to the United States Probation Office in the Northern District of Indiana within 48 hours of his release from the custody of the Bureau of Prisons; and,

(4) that defendant Benedicto Diaz surrender any passport to the United States Probation Office within 48 hours of his release.

SO ORDERED

Enter: February 24, 2005

/s/ JAMES T. MOODY
JUDGE JAMES T. MOODY
UNITED STATES DISTRICT COURT

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-4221

EFRAIN SANTOS, PETITIONER-APPELLEE

v.

UNITED STATES OF AMERICA

Appeal from the United States District Court
for the Northern District of Indiana
Hammond Division

[Filed: Apr. 8, 2005]

The following is before the court: **PETITION FOR INITIAL HEARING EN BANC**, filed on March 14, 2005, by counsel for the appellant.

No judge in active service has requested a vote on the petition. Accordingly,

IT IS ORDERED that the petition is **DENIED**.

APPENDIX E

1. Section 1956(a)(1) of Title 18, United States Code provides:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—
>
> (A) (i) with the intent to promote the carrying on of specified unlawful activity; or
>
> (ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or
>
> (B) knowing that the transaction is designed in whole or in part—
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
>
> (ii) to avoid a transaction reporting requirement under State or Federal law,
>
> shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

2. Section 1956(c) of Title 18, United States Code, provides in pertinent part:

(C) As used in this section—

* * * * *

(7) the term "specified unlawful activity" means—

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31;

* * * * *

3. Section 1961 of Title 18, United States Code, provides in pertinent part:

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section

1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1591 (relating to peonage, slavery, and trafficking in persons), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering

of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), sections 175-178 (relating to biological weapons), sections 229-229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importa-

tion, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

4. Section 1955 of Title 18, United States Code, provides in pertinent part:

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.
>
> (b) As used in this section—
>
> (1) "illegal gambling business" means a gambling business which—
>
> (i) is a violation of the law of a State or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> (iii) has been or remains in substantially continuous operation for a period in excess of

thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

* * * * *

Supreme Court, U.S.
FILED
MAR 26 2007
OFFICE OF THE CLERK

(3)

No. 06-1005

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EFRAIN SANTOS AND BENEDICTO DIAZ,

Respondents.

On Petition For Writ of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT BENEDICTO DIAZ

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BRIEF IN OPPOSITION FOR RESPONDENT BENEDICTO DIAZ

Respondent Benedicto Diaz respectfully requests that the Court deny the petition for a writ of certiorari.

This Court has been presented with the same question on three other occasions since 2002. On all three occasions, the Court has declined review. Every substantive argument now made by the government has been presented before. To this day, however, the government's predictions that the Seventh Circuit's interpretation of the money laundering statute will create "recurring" and "serious" enforcement problems remain unsubstantiated. As for the asserted conflict with other circuits, this Court has declined review even when the same conflict was presented previously. Moreover, the government has failed to show that the statutory interpretation it advocates would lead to a different result on the particular facts of this case.

In short, the question presented is no more suitable for review now than it was on prior occasions, and this case is not an appropriate vehicle for addressing it. The petition therefore should be denied.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 461 F.3d 886. The opinion of the district court granting in part Diaz's motion for collateral relief (Pet. App. 51a-79a) is unreported. The opinion of the district court granting in part respondent Efrain Santos's motion for collateral relief (Pet. App. 17a-50a) is reported at 342 F. Supp. 2d 781.

STATEMENT OF THE CASE

Benedicto Diaz was charged in the Northern District of Indiana with "promotion money laundering" under 18 U.S.C. § 1956(a)(1), the federal money laundering statute, and

certain other offenses.[1] (Pet. App. 54a.) The charges arose from Diaz's participation in an illegal lottery known as a "bolita." (Pet. App. 52a.) The bolita employed "runners" who accepted bets, usually at bars and restaurants. (Pet. App. 52a.) Runners took a 15-25% commission from the bet money, then delivered the betting slips and remaining money to the bolita's "collectors." (Pet. App. 52a.) Diaz was a collector. He took a portion of the money for himself as "salary" (and occasionally paid off bettors who had won $100 or less), then delivered the remaining money and the betting slips to the bolita's operator, Efrain Santos. (Pet. App. 52a-53a.)

Pursuant to a guilty plea, Diaz was convicted of conspiracy to commit money laundering under 18 U.S.C. §

---

[1] 18 U.S.C. § 1956(a)(1) provides in relevant part:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity . . . ; or
>
> (B) knowing that the transaction is designed in whole or in part—
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity . . .
>
> shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

Typically the two subsections are referred to as "promotion laundering" (subsection (a)(1)(A)(i)) and "concealment laundering" (subsection (a)(1)(B)(i)).

1956(h).[2] (Pet. App. 54a-55a.) His conviction was based solely on the fact that "he received payment for his 'collecting' services by taking money directly out of the total collected bets" before delivering the remaining bet money to Santos. (Pet. App. 54a-55a & n.5.) He was sentenced to a prison term of 108 months and fined $5,000. (Pet. App. 56a.)

Unlike Diaz, Santos went to trial. He was convicted of money laundering, conspiracy to commit money laundering, conducting an illegal gambling business, and conspiracy to conduct an illegal gambling business. (Pet. App. 18a, 20a.) He was sentenced to concurrent prison terms of 210 months for the money laundering convictions and 60 months for the illegal gambling convictions. (Pet. App. 20a.)

Diaz and Santos appealed their convictions, on different grounds. Diaz's appeal was limited to challenging the district court's rejection of his request to withdraw his guilty plea. (Diaz made that request on the ground that the government had breached his plea agreement by failing to seek a reduced sentence in exchange for his assistance.) (Pet. App. 55a-56a.) The convictions of both Diaz and Santos were affirmed in *United States* v. *Febus*, 218 F.3d 784 (7th Cir.), cert. denied, 531 U.S. 1021 (2000).

Approximately two years later, in *United States* v. *Scialabba*, 282 F.3d 475 (7th Cir.), cert. denied, 537 U.S. 1071 (2002), the Seventh Circuit held that the money laundering statute was inapplicable to conduct that was virtually identical to the conduct underlying Diaz's and Santos's money laundering convictions. The court held that the word "proceeds" in the statute was properly interpreted as net profits rather than gross receipts. 282 F.3d at 478.

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[2] 18 U.S.C. § 1956(h) provides: "Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy."

The unanimous opinion in *Scialabba*, written by Judge Easterbrook, supported its interpretation on several grounds. First, the court observed that the broader "gross receipts" interpretation conflicts with "the normal understanding of money laundering" by extending the money laundering statute to cover the payment of day-to-day expenses integral to the predicate offense. Under that extension of the statute, "the predicate crime merges into money laundering (for no business can be carried on without expenses) and the word 'proceeds' loses operational significance." *Id.* at 475.

Second, the court pointed out that the "gross receipts" interpretation would lead to "odd outcomes" by dictating radically different results in functionally identical cases. *Id.* at 477. For example, the government conceded that under its interpretation, no "proceeds" would arise when an illegal slot machine or other gambling mechanism made payouts on winning bets automatically, whereas "proceeds" *would* arise when gamblers collected their winnings from the machine's operator via "separate transactions." Even though the economic results were the same, the operator in the former case would be subject to conviction for illegal gambling only, but in the latter case would be subject to conviction—and much harsher punishment—for money laundering as well. *Id.*

Third, the court noted that if a "gross receipts" interpretation were applied, "we would have to decide whether, as a matter of statutory construction (distinct from double jeopardy), it is appropriate to convict a person of multiple offenses when the transactions that violate one statute necessarily violate another." *Id.* "By reading § 1956(a)(1) to cover only transactions involving profits, we curtail the overlap and ensure that the statutes may be applied independently to sequential steps in a criminal enterprise." *Id.*

Finally, the court held, the "rule of lenity" requires that any ambiguity in the statute be resolved by applying the

narrower interpretation of the word "proceeds." Because Congress could easily have used the word "receipts" instead of "proceeds," the rule of lenity "counsels against transmuting the latter into the former and catching people by surprise in the process." *Id.*

Citing *Scialabba*, Diaz and Santos pursued collateral relief under 28 U.S.C. § 2255. The district court granted relief to both and vacated their money laundering convictions in parallel rulings. (Pet. App. 17a-86a.) On appeal from those rulings, the government's sole argument was that *Scialabba* was wrongly decided and should be overturned. (Pet. App. 4a.) The Seventh Circuit rejected the government's argument and affirmed the district court's rulings as to both Diaz and Santos. (Pet. App. 1a-16a.) The government's petition for a writ of certiorari followed.

REASONS FOR DENYING THE PETITION

This Court has already declined review of the question presented in three separate cases over the last four years, including *Scialabba* itself. All of the government's current arguments for a "gross profits" interpretation were also made in its *Scialabba* petition. Four years later, the government's reiterated predictions that *Scialabba* will create "recurring" and "serious" enforcement problems remain unsubstantiated. The government still has failed to provide a single concrete example of an investigation stymied by *Scialabba*. Furthermore, the mere fact that two other circuits have now expressly disagreed with *Scialabba* does not shift the balance in favor of review. This Court declined review of the question in those cases as well. In any event, the government has failed to show that the approach it advocates would lead to a different result on the facts of this particular case.

Contrary to the government's contentions, *Scialabba* does not require the development of special "accounting theories" for criminal enterprises. The government offers no reason to think that a bolita, for example, differs significantly from

legitimate lotteries or other cash-based businesses with respect to determining income, profits, and losses. In addition, the government's hypothetical assertions about insufficient documentation are belied by the undisputed facts of this case, in which the government recovered a trove of financial records—including records of the bolita's *accountant*. Money laundering is a quintessentially financial crime and typically involves transactional evidence of some kind. Indeed, the government does not dispute that it can and does quantify the profits of illegal enterprises under other statutes. Finally, the government's citation of cases in which transactions involving "expenses" or "reinvestments" were successfully prosecuted in no way demonstrates that *Scialabba*'s standard was unattainable in those cases, and the government's suggestion that "concealment" cases will be more difficult to prove is likewise unsupported.

Finally, the government fails to rebut two basic justifications cited by *Scialabba* for the "net profits" interpretation. First, *Scialabba* invoked the rule of lenity, a settled rule of statutory construction, under which any ambiguity in the statute must be resolved in favor of the narrower interpretation. The government's petition does not even mention the rule. Second, *Scialabba* pointed out the necessity of avoiding a merger of money laundering with the predicate offense (e.g., illegal gambling). The government concedes that necessity. Moreover, it does not dispute that *Scialabba*'s "net profits" interpretation successfully avoids the merger problem. The government merely asserts that the problem should be addressed differently—by applying a "gross profits" interpretation while requiring that any alleged laundering transaction occur subsequent to the predicate offense. As the government's own hypotheticals suggest, however, this timing standard is indeterminate and leads to inconsistent results. Accordingly, the petition should be denied.

A. The Government's Criticisms Of *Scialabba* Are No More Persuasive Now Than When Review Was Sought And Denied In *Scialabba*.

In criticizing *Scialabba*'s reasoning and its supposed effects, the government has simply restated, essentially verbatim, the arguments and predictions made in its *Scialabba* petition. This Court denied the *Scialabba* petition in 2002 (not 2004, as the government states (Pet. 27).) The intervening years have not improved the government's assertions.

1. The government's principal argument is that *Scialabba* will create "recurring" and "serious practical problems" that will hinder money laundering prosecutions. (Pet. 15, 26.) The government made the same prediction in its *Scialabba* petition. (*Scialabba* Pet. 21-23.) Nevertheless, the government still has failed to cite a single example of a prosecution that has actually been hindered. Its assertions remain entirely speculative and hypothetical.

The government contends that *Scialabba* creates two types of "practical problems": (a) in some cases, the government may find it difficult to prove net profits because special "accounting principles" for criminal enterprises have not been developed and records may be inadequate (Pet. 11, 15-17); and (b) *Scialabba* "forecloses prosecution of expense cases as a legal matter and sever[e]ly limits prosecution of reinvestment cases as a practical matter," and "will also likely impede prosecutions under the concealment subsection of the money laundering statute" (Pet. 19). None of these contentions, however, is supported by concrete evidence.

"*Accounting theory*" *and* "*record keeping.*" The government argues that "there are no generally accepted accounting principles for criminal enterprises," and that a "net profits" interpretation will "require the courts to formulate an accounting theory for illegal businesses." (Pet. 15.) This is both speculative and counter-intuitive. Determining net

profits by subtracting expenses from gross receipts follows the same basic "accounting principles" whether a business is lawful or unlawful. Courts understand the concepts of gross receipts and net profits, and routinely apply them in a wide variety of contexts. Novel "accounting theories" or Wharton School PhD's are unnecessary.

Equally unpersuasive is the government's assertion that "record keeping" will be inadequate. Gambling and other businesses in which money laundering is endemic typically generate records and other transactional evidence sufficient to support whatever basic calculations are necessary. This case vividly illustrates the point. The government recovered a trove of "ledgers," "betting sheets, betting slips, cash, and other evidence of [defendants'] illegal Bolita." (Pet. App. 19a, 20a.) Indeed, as conceded in its briefing below, the government even recovered financial records from the bolita's *accountant*.

It should also be noted that, since at least 1991, the Seventh Circuit has applied its "net profits" interpretation to RICO's criminal forfeiture statute.[3] See *United States* v. *Masters*, 924 F.2d 1362, 1369-70 (7th Cir.), cert. denied, 500 U.S. 919, 502 U.S. 823 (1991). The government does not suggest that consequent "accounting theory" and "record keeping" problems have prevented it from enforcing the RICO forfeiture provision effectively. See also *United States* v. *Sapoznik*, 161 F.3d 1117, 1119 (7th Cir. 1998) (calculation of net profits required under sentencing guidelines).

"Expense," "reinvestment," and "concealment" cases. The government argues that *Scialabba* will impede the prosecution of "promotion laundering" cases that involve

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[3] That statute, 18 U.S.C. § 1963(a)(3), provides for forfeiture of "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962."

"expenses" or "reinvestment," and may impede the prosecution of "concealment laundering" cases as well. (Pet. 17-19.) Those arguments, too, are unsupported.

The government cites numerous cases in which activity involving "expenses" or "reinvestment" appears to have been successfully prosecuted (Pet. 17 n.3, 18 n.4), but it never takes the necessary further step of showing that such cases would have failed under *Scialabba*. Simply because a prosecution was successful under one standard ("gross receipts") does not mean that evidence was unavailable to support a prosecution under another standard ("net profits").

Of course, a hypothetical case in which no proof exists for anything other than "expense" transactions would be excluded under *Scialabba*, but that is simply another way of saying that net profits are required under *Scialabba*. It does not follow that significant numbers of actual cases will fall into this supposed "pure expense" category, and common sense suggests that substantial criminal enterprises usually will involve more than just expense payments. As for "reinvestment," *Scialabba* is fully consistent with that concept. Reinvestment typically involves plowing *profits* back into a business to strengthen and expand it, not just paying day-to-day expenses.[4]

Finally, the government declares that *Scialabba* may make it more difficult to prosecute not only "promotion laundering" but also "concealment laundering." (Pet. 19.) This assertion remains unsubstantiated as well. The government fails to identify even a single "concealment" case

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[4] See, e.g., *United States* v. *Wilson*, 244 F.3d 1208, 1211 (10th Cir. 2001) (like other "successful entrepreneurs," drug traffickers "reinvested early profits" to expand their unlawful business); *Estate of Wallace* v. *Comm'r*, 965 F.2d 1038, 1040 (11th Cir. 1992) (lawful cattle-feeding business grew by "reinvesting profits in more cattle").

that would have succeeded but for *Scialabba*. In any event, the "net profits" interpretation is just as appropriate in the "concealment" context as it is in the "promotion" context. "Concealment" laundering involves extracting money from an unlawful business and investing it elsewhere to disguise its tainted origins. Money extracted from a business and invested elsewhere typically consists of net profits, not gross receipts, whether the business is lawful or unlawful. In contrast, payment of an illegal enterprise's ongoing expenses normally does nothing to conceal the illicit nature of the money employed. As the Seventh Circuit has explained in addressing "concealment" laundering, "the mere transfer and spending of funds is not enough to sweep conduct within the money laundering statute"; "it is important, even if difficult at times, to ensure that the money laundering statute not turn into a 'money spending statute.'" *United States* v. *Esterman*, 324 F.3d 565, 570, 573 (7th Cir. 2003).

In sum, although difficulties of proof may arise in individual cases under the "net profits" standard (just as they do under a host of other legal standards), the government has failed to make the slightest showing that any supposed difficulties are endemic and insurmountable.

2. The government also criticizes *Scialabba*'s "net profits" interpretation by citing a few dictionary definitions and the interpretation of "proceeds" under some other statutes. (Pet. 12.) The government made exactly the same arguments in its *Scialabba* petition. (*Scialabba* Pet. 8-9.) Once again, the government's arguments are no more persuasive now than they were before.

Selected dictionary definitions. In support of a "gross profits" interpretation, the government cites selected definitions of the word "proceeds" in Random House, Black's, and Webster's dictionaries. As the government acknowledges, however, other definitions in the same dictionaries support a "net profits" interpretation. (Pet. 12-

13.) See, e.g., *Random House Dictionary of the English Language* 1146-47 (2d ed. 1987) (defining "proceeds" as "the *profits* or returns from a sale, investment, etc.") (emphasis added); *Webster's Third New International Dictionary* 1807 (1993) (defining "proceeds" as "the *net sum* received (as for a check, a negotiable note, an insurance policy) after deduction of any discount or charges") (emphasis added).

Thus, the government's dictionary definitions are inconclusive at best. Indeed, the Third Circuit in *United States* v. *Grasso*, 381 F.3d 160 (3d Cir. 2004), vacated on other grounds, 544 U.S. 945 (2005)—one of the post-*Scialabba* decisions on which the government relies—rejected dictionary definitions as "neither uniform nor dispositive." 381 F.3d at 167.

Other statutes. Also inconclusive are the government's references to some other statutes that use the word "proceeds"—in particular, RICO's criminal forfeiture provision. (Pet. 13-14.) The government cites three decisions that interpret the word "proceeds" there as meaning "gross receipts." (Pet. 13.)[5] As already noted, however, the Seventh Circuit has consistently adhered to a "net profits" interpretation in the RICO forfeiture context as well. The Seventh Circuit made its position clear in a 1991 decision that this Court declined to review. *United States* v. *Masters*, 924 F.2d 1362, 1369-70 (7th Cir.), cert. denied, 500 U.S. 919, 502 U.S. 823 (1991). The government fails to identify any enforcement problems created by the Seventh Circuit's interpretation over the last 15 years.

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[5] The government cites *United States* v. *Simmons*, 154 F.3d 765 (8th Cir. 1998); *United States* v. *DeFries*, 129 F.3d 1293 (D.C. Cir. 1997); and *United States* v. *Hurley*, 63 F.3d 1 (1st Cir. 1995), cert. denied, 517 U.S. 1105 (1996). See also *Scialabba* Pet. 16 n.3 (citing the same three cases).

Finally, the government cites a few other statutes in other contexts (Pet. 14 & n.2), but it notably omits any discussion of the statute that defines the predicate offense in this very case, illegal gambling. That statute, 18 U.S.C. § 1955(b)(1)(iii), refers to a business that "has a *gross revenue* of $2,000 in any single day" (emphasis added). Numerous other criminal statutes refer to "gross revenue" or "gross receipts" as well. E.g., 18 U.S.C. § 225(a)(2); 18 U.S.C. § 1511(b)(1)(iii) & (c); 18 U.S.C. § 1955(c) & (e); 18 U.S.C. § 3591(b)(1); 21 U.S.C. § 848(b)(2)(B); 21 U.S.C. § 856(d)(1)(B). Congress evidently knew how to use the term "gross revenue" or "gross receipts" but chose not to do so in the money laundering statute.

B. The Putative Circuit Conflict Is More Illusory Than Real.

Apart from reiterating its previous criticisms of *Scialabba*, the government argues that a circuit conflict has arisen because two post-*Scialabba* cases expressly disagree with the Seventh Circuit's position: *United States* v. *Iacaboni*, 363 F.3d 1 (1st Cir.), cert. denied, 543 U.S. 978 (2004); *United States* v. *Grasso*, 381 F.3d 160 (3d Cir. 2004), vacated on other grounds, 544 U.S. 945 (2005). (Pet. 22-23.) This is the government's one attempt to distinguish the present petition from its petition in *Scialabba*, but it, too, is unconvincing.

1. *Iacaboni* and *Grasso* both presented this Court with further occasions to consider the question presented. The Court declined the invitation in both cases. In *Iacaboni*, review was denied even though the defendant's petition asserted a circuit split between *Iacaboni* and *Scialabba* on the "gross receipts vs. net profits" question. (*Iacaboni* Pet. 7-9.) Similarly, in *Grasso*, the defendant's petition asserted a circuit split between *Grasso* and *Iacaboni* on one side and *Scialabba* on the other. (*Grasso* Pet. 7-9.) Once again, this Court declined to consider the issue but granted the petition and vacated *Grasso* in light of *United States* v. *Booker*, 543

U.S. 220 (2005). The Seventh Circuit's reaffirmation of *Scialabba* in the present case does nothing to alter these circumstances in favor of review.[6]

In any event, the government fails to demonstrate how its interpretation of *Iacaboni* and *Grasso* would lead to a different result on the particular facts of this case. According to the government, even under a "gross receipts" interpretation, a money laundering transaction still "must follow and be separate from any transaction necessary for the predicate offense to generate proceeds." (Pet. 20, quoting *United States* v. *Mankarious*, 151 F.3d 694, 706 (7th Cir.), cert. denied, 525 U.S. 1056 (1998).) Here, however, the transactions in question were integral parts of the predicate offense, i.e., conducting an illegal gambling business. Diaz, for example, was convicted of nothing more than taking his "salary" from the money he collected before handing over the rest to Santos. Even under the government's approach, Diaz's conviction was invalid because the conduct in question did not "follow" and was not "separate from" the illegal activity that generated the supposed proceeds. Insofar as this Court reviews judgments, not opinions, it should await a proper vehicle for deciding the question presented.

2. In all other respects, the government's assertions of conflict cover exactly the same ground as its unsuccessful petition in *Scialabba*. For example, the government declares that *Scialabba* "cannot be squared with the results in numerous cases in which courts of appeals have found sufficient evidence to support money laundering convictions based on the use of receipts of illegal activity to pay accomplices or other costs incurred to conduct that activity." (Pet. 25.) The government describes those cases as involving

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[6] The government also cites *United States* v. *Huber*, 404 F.3d 1047, 1058 (8th Cir. 2005) (Pet. 24), which follows *Grasso* in the forfeiture context but does not refer to *Scialabba*.

"overhead expenses"[7] and "reinvestment of illegally-derived funds."[8] The same assertions were made in the *Scialabba* petition, using virtually identical language. (*Scialabba* Pet. 13, 18-20.) The present petition merely adds a few newer cases that go no further than the old ones.[9] None of the cited

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[7] Pet. 17 & n.3, citing: *United States* v. *Alerre*, 430 F.3d 681 (4th Cir. 2005); *United States* v. *Caplinger*, 339 F.3d 226 (4th Cir. 2003); *United States* v. *Bolden*, 325 F.3d 471 (4th Cir. 2003); *United States* v. *Evans*, 272 F.3d 1069 (8th Cir. 2001); *United States* v. *Wyly*, 193 F.3d 289 (5th Cir. 1999); *United States* v. *Rudisill*, 187 F.3d 1260 (11th Cir. 1999); *United States* v. *Reed*, 167 F.3d 984 (6th Cir.), cert. denied, 528 U.S. 897 (1999); *United States* v. *King*, 169 F.3d 1035 (6th Cir.), cert. denied, 528 U.S. 892 (1999); *United States* v. *France*, 164 F.3d 203 (4th Cir. 1998); *United States* v. *Hildebrand*, 152 F.3d 756 (8th Cir.), cert. denied, 525 U.S. 1033 (1998); *United States* v. *Coscarelli*, 105 F.3d 984 (5th Cir. 1997); *United States* v. *Marbella*, 73 F.3d 1508 (9th Cir. 1996); *United States* v. *Skinner*, 946 F.2d 176 (2d Cir. 1991).

[8] Pet. 18 & n.4, citing: *United States* v. *Silvestri*, 409 F.3d 1311 (11th Cir.), cert. denied, 126 S.Ct. 772 (2005); *United States* v. *Williamson*, 339 F.3d 1295 (11th Cir. 2003); *United States* v. *Godwin*, 272 F.3d 659 (4th Cir. 2001); *United States* v. *Barragan*, 263 F.3d 919 (9th Cir. 2001); *United States* v. *Dovalina*, 262 F.3d 472 (5th Cir. 2001); *United States* v. *Stewart*, 256 F.3d 231 (4th Cir.), cert. denied, 534 U.S. 1049 (2001), 535 U.S. 977 (2002); *United States* v. *Burgos*, 254 F.3d 8 (1st Cir.), cert. denied, 534 U.S. 1010 (2001); *United States* v. *Meshack*, 225 F.3d 556 (5th Cir. 2000), cert. denied, 531 U.S. 1100 (2001); *United States* v. *Taylor*, 239 F.3d 994 (9th Cir. 2001); *United States* v. *Haun*, 90 F.3d 1096 (6th Cir. 1996); *United States* v. *Golb*, 69 F.3d 1417 (9th Cir. 1995); *United States* v. *Thomas*, 12 F.3d 1350 (5th Cir.), cert. denied, 511 U.S. 1095, 1114 (1994); *United States* v. *Cruz*, 993 F.2d 164 (8th Cir. 1993); *United States* v. *Cole*, 988 F.2d 681 (7th Cir. 1993); *United States* v. *Johnson*, 971 F.2d 562 (10th Cir. 1992); *United States* v. *Jackson*, 935 F.2d 832 (7th Cir. 1991).

[9] The added "overhead expense" cases are *Alerre*, *Caplinger*, and *Bolden*; the added "reinvestment" cases are *Silvestri* and *Williamson*.

cases refers to *Scialabba* (even though several post-date it); none of them addresses the "gross receipts vs. net profits" question; and none of them establishes that prosecution under the "net profits" standard would have been impossible in their respective circumstances.

C. The Government Has Failed To Rebut *Scialabba*'s Underlying Justifications.

Scialabba cites two underlying justifications for its "net profits" interpretation: (1) the rule of lenity, and (2) the need to avoid a merger of money laundering with the predicate offense. The government fails to rebut either justification.

Indeed, the government does not even *mention* the rule of lenity. Under this settled rule, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States* v. *Bass*, 404 U.S. 336, 347 (1971); see also *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000).

In addition, *Scialabba* emphasizes the need to avoid a statutory interpretation that effectively merges money laundering with the predicate offense. Courts recognize that money laundering charges can be used improperly to ratchet up sentences beyond those available solely for the underlying crime. See, e.g., *United States* v. *Montague*, 29 F.3d 317, 318 (7th Cir. 1994) ("an aggressive United States Attorney can use the money laundering statute" to obtain "more draconian sentences" than the underlying crime entails); see also *United States* v. *Conley*, 37 F.3d 970, 979 (3d Cir. 1994) ("Congress did not enact money laundering statutes simply to add to the penalties for various crimes in which defendants make money").

The government concedes that avoiding a merger of money laundering with the predicate offense is a legitimate concern. Moreover, the government does not dispute that *Scialabba*'s "net profits" interpretation avoids such a merger. The government merely argues that *Scialabba* should have

solved the problem differently. As already noted, the government contends that the problem can be avoided by applying a "gross receipts" standard while "generally requiring that the charged financial transaction 'must follow and must be separate from any transaction necessary for the predicate offense to generate proceeds.'" (Pet. 20, quoting *Mankarious*, 151 F.3d at 706.)

The government's approach, however, fails to provide a consistent basis for avoiding the merger problem. For example, the government argues that there are no "proceeds" from a bank robbery "until the bank has been robbed"; thereafter, "a bank robber's use of the loot from a robbery to pay his accomplices can constitute money laundering, because the payment to the accomplices involves the proceeds generated by the robbery." (Pet. 20-21.) The government's before/after test, however, is legally and logically inadequate.

Suppose, for example, that the bank robber's accomplice serves as a lookout at the door, and instead of making a subsequent payment, the robber and lookout agree in advance that the lookout can take his payment from the nearest cashier while the robber takes the rest. Under the government's approach, the subsequent payment is money laundering but the contemporaneous payment is not—it is bank robbery, the predicate offense. The government's distinction makes no sense because the economic results are identical. (As noted above, an analogous situation was discussed in *Scialabba*, which contrasted an illegal slot machine that makes automatic payouts to winners with another machine that requires winners to collect their money separately. The government sought to distinguish the two, but, again, the economic results are identical. See *Scialabba*, 282 F.3d at 477.)

The bank robbery example crystallizes Diaz's situation here. Diaz was convicted of money laundering for the simple act of taking his "salary" from the money he had collected before delivering the rest to Santos. Suppose, instead, that he

first delivered all of the money to Santos and then a moment later received some of it back as his salary. Would that make a difference? Apparently it would, according to the government's before/after theory. But Diaz was convicted for taking his salary *before*, not after, delivery, and the government seeks to reinstate his conviction. The government's approach is inconsistent on the undisputed facts of this case. Moreover, the government's approach would ensnare the courts in metaphysical questions concerning which aspects of an ongoing business are temporally distinguishable from others. *Scialabba* avoids such metaphysical questions and looks instead at economic reality—whether the money constituted net profits. That question may involve occasional difficulties of proof (as do many other legal tests), but the question itself is simple and concrete.[10]

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[10] The government's cited authority, *Mankarious*, actually contradicts the government's theory that timing will consistently distinguish money laundering from the underlying crime. *Mankarious* states: "Because, as we have already explained, money laundering does not focus on the specifics of the predicate offense, *it does not matter when all the acts constituting the predicate offense take place*. It matters only that the predicate offense has produced proceeds in transactions distinct from those transactions allegedly constituting money laundering." 151 F.3d at 706 (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 06-1005

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EFRAIN SANTOS and BENEDICTO DIAZ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT EFRAIN SANTOS

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STATEMENT

Whether the term "proceeds" in 18 U.S.C. § 1956(a)(1) means "gross receipts" or "only the profits"—or something in between—is an issue this Court may need to address, but this is *not* a good case in which to do so. Even if, as the government contends, "proceeds" means gross receipts, this case does not present the predicate "financial transaction which in fact involves the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(1). The only "financial transaction[s]" the government showed are collecting bets and paying winners. Those transactions are essential aspects of the "specified unlawful activity" itself—*i.e.*, "conduct[ing] . . . an illegal gambling business" under 18 U.S.C. § 1955. The question presented by the Petition should be addressed in a case that actually involves, as the government puts it, "conduct that *goes beyond the underlying crime* and entails use of the revenue produced by that crime." (Pet. 22 (emphasis added).)

1. Respondent Efrain Santos was charged with and convicted of running an illegal gambling business in violation of 18 U.S.C. § 1955 and of conspiring to run an illegal gambling business in violation of 18 U.S.C. § 371. Under § 1955, conducting a gambling business in violation of state or local law constitutes a federal crime. 18 U.S.C. § 1955(a). That statute, enacted as part of the Organized Crime Control Act of 1970, P.L. 91-452, 84 Stat. 922, states in pertinent part:

> § 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

The illegal gambling business Santos was convicted of running is known as a bolita, a type of lottery. The winning numbers in this bolita were based on the daily Pick Three and Pick Four Illinois lottery games and on the Puerto Rican Lottery. (Pet. App. 19a.) Santos had "runners" accept bets for his bolita primarily in bars and restaurants. (*Id.*) The runners would take a commission of 15-20% from the bet money and deliver the betting slips and the balance of the money to "collectors." (*Id.*) The collectors would then deliver the slips and bet money to Santos; before doing so, the collectors frequently took a "salary" out of the bet money and, on occasion, paid bolita winners who won $100 or less. (*Id.*) Santos paid the bolita's "big" winners. (*Id.*)

2. In addition, Santos was convicted of money laundering in violation of 18 U.S.C. § 1956(a) and of conspiring to commit money laundering in violation of 18 U.S.C. § 1956(h). Santos's money laundering convictions were for only "promotional" money laundering under § 1956(a)(1)(A)(i). That statute provides:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity;
>
> . . .
>
> shall be sentenced to a fine of not more than $500,000 or twice the value of the property

> involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. For purposes of this paragraph, a financial transaction shall be considered to be one involving the proceeds of specified unlawful activity if it is part of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement.

18 U.S.C. § 1956(a)(1)(A)(i).

"Specified unlawful activity" is defined as "any act or activity constituting an offense listed in [18 U.S.C. § 1961(1)]." 18 U.S.C. § 1956(c)(7)(A). Among those offenses is conducting an illegal gambling business in violation of 18 U.S.C. § 1955.

3. Santos was sentenced to concurrent prison terms of 60 months for the illegal gambling convictions and 210 months for the money laundering convictions. (Pet. App. 18a, 20a.)

4. On direct appeal, Santos presented a single issue for review: whether "the evidence was insufficient to convict him of money laundering because his cash payments to the bolita's collectors and winners were essential transactions of the illegal gambling business, and thus cannot also constitute transactions under the promotion provision of the money laundering statute, 18 U.S.C. § 1956(a)(1)(A)(i)." *United States v. Febus*, 218 F.3d 784, 789 (7th Cir. 2000). The court of appeals upheld Santos's money laundering convictions, based on Seventh Circuit precedent that "[a] transaction satisfies the promotion provision of the

money laundering statute if it constitutes 'the practice of plowing back proceeds of [the illegal activity] to promote that activity.'" *Id.* at 789 (quoting *United States v. Jackson*, 935 F.2d 832, 842 (7th Cir. 1991)).

5. After *Febus*, the Seventh Circuit decided *United States v. Scialabba*, 282 F.3d 475 (7th Cir. 2002) (Easterbrook, J.), which addressed the meaning of the term "proceeds" in § 1956(a)(1) as it relates to business-like criminal activity. The court held that "at least when the crime entails voluntary, business-like operations, 'proceeds' must be net income; otherwise, the predicate crime merges into money laundering (for no business can be carried on without expenses) and the word 'proceeds' loses operational significance." *Id.* at 475.

6. Citing *Scialabba*, Santos pursued relief under 28 U.S.C. § 2255 arguing, among other things, the opinion in *Scialabba* required his convictions for money laundering be set aside and that he be re-sentenced. (Pet. App. 25a.) The district court, noting (as did the government) that the relevant facts of *Scialabba* are "amazingly similar" to those of Santos's case, found that Santos's money laundering convictions must be vacated under the holding of *Scialabba.* (Pet. App. 39a, 48a-49a)

7. The Seventh Circuit, on the government's appeal, upheld the district court's decision. (Pet. App. 1a-16a.)

REASONS FOR DENYING THE PETITION

A. Whether or Not "Proceeds" Means Gross Receipts, There is No Financial Transaction in This Case Which Involves the Proceeds of a Specified Unlawful Activity.

The question presented by the Petition—whether "proceeds" in § 1956(a)(1) means gross receipts or net profits from the specific unlawful activity—does not control the outcome of this case. That statute requires a "financial transaction which in fact involves" such proceeds. 18 U.S.C. § 1956(a)(1). There are no such transactions in this case which in fact involve the proceeds of a specified unlawful activity.

Rather, the only financial transactions the government showed here were transactions constituting the underlying specified unlawful activity—the operation of an illegal gambling business in violation of 18 U.S.C. § 1955(a). One type of financial transaction was the collection and delivery to Santos of the bet money and betting slips, with the "runners" and "collectors" deducting their compensation from the bet money before passing on the balance. (Pet. App. 19a.) If bets are not collected, no gambling business is conducted. If runners and collectors are not compensated, collection will not occur. Moreover, here the runners and collectors are also necessary to satisfy the statutory requirement that the business of illegal gambling "involve five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such [illegal gambling] business." 18 U.S.C. § 1955 (b)(1)(ii). The other type of financial transaction was paying winnings to winning bettors. If winners are not paid, again no gambling business is conducted.

Section 1956(a)(1), in contrast, requires a transaction in the proceeds of specified unlawful activity *other than* the mere consummation of the unlawful activity itself. In the government's words, "conduct" is required "that goes beyond the underlying crime." (Pet. 22.) In the words of the government's cited authority (Pet. 20), what "matters" is "that the predicate offense has produced proceeds *in transactions distinct from* those transactions allegedly constituting money laundering." *United States v. Mankarious*, 151 F.3d 694, 706 (7th Cir. 1998) (emphasis added). In the more recent words of another circuit, "allegations of money laundering *that are inseparable from the underlying crime*, such as certain financial fraud transactions, have not withstood scrutiny." *United States v. Awada*, 425 F.3d 522, 524 (8th Cir. 2005) (emphasis added).

For example, the *Awada* court cited a case where money laundering convictions were reversed because "the withdrawal of [bank] funds charged as money laundering was one and the same as the underlying criminal activity of bank fraud and misapplication of bank funds." *United States v. Christo*, 129 F.3d 578, 581 (11th Cir. 1997). Put differently, there was no evidence that the defendant "engaged in a monetary transaction that was separate and in addition to the underlying criminal activity."[1] *Id*; *see also, e.g., United States v. Johnson*, 971 F.2d 562, 567-70 (10th Cir. 1992) (reversing money laundering convictions under § 1957 where

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[1] *Christo* involved money laundering charged under 18 U.S.C. § 1957. The Courts of Appeals agree that for purposes of the issue discussed above, "proceeds of specified unlawful activity" under § 1956(a)(1) and "criminally derived property" under § 1957 should be interpreted in the same manner. *E.g., Mankarious*, 151 F.3d at 704-05 & n.1; *United States v. Savage*, 67 F.3d 1435, 1442 (9th Cir. 1995).

the transactions alleged to constitute money laundering were the same wire transmissions necessary for the underlying wire fraud); *United States v. McGahee*, 257 F.3d 520, 528 (6th Cir. 2001) (reversing convictions because "[d]iverting the funds were part and parcel of the fraud and theft, and were not a separate act completed after the crime, as required under [§ 1956(a)(1)]").

Similarly, the court in *United States v. Dimeck*, 24 F.3d 1239 (10th Cir. 1994), reversed convictions under § 1956(a)(1) because the claimed money laundering transaction was the receipt and delivery of funds in payment for previously delivered illegal drugs. The court held that until payment for the drugs was made, "the underlying drug transaction had not yet been completed and the money laundering activity had not yet begun." *Id.* at 1246; *see also United States v. Gaytan*, 74 F.3d 545, 555-56 (5th Cir. 1996) ("funds do not become the proceeds of drug trafficking until a sale of drugs is completed. Hence, a transaction to pay for illegal drugs is not money laundering, because the funds involved are not the proceeds of an unlawful activity when the transaction occurs"; reversing convictions under § 1956(a)(1)).[2]

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[2] As indicated by some of the quotations above, courts often describe this issue in temporal terms, with a money laundering transaction required "after" the specified unlawful activity that generates the proceeds is "completed." Similarly, other cases provide that "because money laundering is an offense to be punished separately from an underlying criminal offense, the primary issue in a money laundering charge involves determining when the predicate crime becomes a completed offense after which money laundering can occur." *United States v. Silvesti*, 409 F.3d 1311, 1334 (11th Cir. 2005) (internal quotation marks omitted) (quoting *Christo*, 129 F.3d

(Cont'd)

Although the underlying crime may be structured to involve multiple transactions, either of necessity or as a matter of the criminal actor's choice, this does not alter § 1956(a)(1)'s requirement of a financial transaction in proceeds beyond the activities constituting the underlying crime. *See Gaytan*, 74 F.3d at 556 ("while it is true that several transactions took place, none involved the proceeds of unlawful activity"); *Dimeck*, 24 F.3d at 1246-47. With respect to selling illegal drugs, the court in *Dimeck* explained:

> A drug transaction, from a business perspective, consists of the distributor (or kingpin) getting the drugs to his middlemen who in turn either sell the drugs directly or have others conduct the actual street sales. The middlemen then collect the money from either their sellers or the consumer (depending upon whether they conduct the sales themselves) and the middlemen then pay the distributor for the drugs that had been advanced to them. It is not unusual for a middleman to use a courier to deliver the money to, and pick up the drugs from, the distributor.

(Cont'd)

at 579-80). While classic money laundering involves first the completion of the underlying crime and then subsequent laundering of the proceeds, other cases have held that money laundering can occur in some situations lacking this temporal sequence. *E.g., Mankarious*, 151 F.3d at 703-06. As discussed in the text and as *Christo* alternatively states, the substantive point is not temporal sequence (although it is convenient and usually accurate to speak in such terms), but rather that money laundering requires a financial transaction "in addition to the underlying criminal activity." 129 F.3d at 581.

24 F.3d at 1246-47 (footnote omitted). Similarly here, the predicate crime of conducting an illegal gambling business may involve several transactions—and always must involve collecting bet money and paying winners.

The widely acknowledged purpose of § 1956(a)(1) itself shows that the transaction or transactions constituting the underlying crime cannot be the "financial transaction which in fact involves the proceeds of [that crime]." *Id.* Congress "intended money laundering to be a separate crime distinct from the underlying offense that generated the money." *United States v. LeBlanc*, 24 F.3d 340, 346 (1st Cir. 1994) (citing *Johnson*, 971 F.2d at 569, and *United States v. Edgmon*, 952 F.2d 1206, 1213 (10th Cir. 1991)). The purpose was *not* to provide "an alternative means of punishing the prior 'specified unlawful activity.'" *United States v. Heap*, 39 F.3d 479, 486 (4th Cir. 1994) (quoting *Edgmon*, 952 F.2d at 1214). Rather, "'Congress intended . . . to punish activity that was not previously punished criminally,'" *Dimeck*, 24 F.3d at 1244 (quoting *Edgmon*, 952 F.2d at 1214), and thereby to fill "'the gap in the criminal law with respect to the post-crime hiding of the illgotten gains.'" *Johnson*, 971 F.2d at 569 (quoting *Edgmon*, 952 F.2d at 1213).

The only transactions involved here—runners and collectors withholding from bet money compensation for their bet-collecting and delivery, and Santos and collectors paying winners—are not "separate crime[s] distinct from the underlying offense that generated the money," *i.e.*, conducting an illegal gambling business. Rather, that activity *was* "previously punished criminally" by § 1955. Section 1956(a)(1) was not intended to provide "an alternative means of punishing" that same activity.

Perhaps adverting to this issue indirectly, the government says that "'proceeds are derived from an already completed offense, *or a completed phase of an ongoing offense*.'" (Pet. 21 (emphasis added) (quoting *United States v. Conley*, 37 F.3d 970, 980 (3d Cir. 1994).) However, the key words in the italicized phrase are "ongoing offense." The transactions constituting money laundering in *Conley* followed *completed* crimes, even though the overall scheme (there, conducting an illegal gambling business) continued. The court reiterated *Edgmon*'s point that money laundering under § 1956 is "intended . . . to apply to transactions occurring after the completion of the underlying criminal activity," and noted that the money laundering transactions there involved the disposition of monies "collected from the [video] poker machines" in "various business establishments" where the "gambling activity occurred." 37 F.3d at 980. In other words, the "proceeds" of conducting an illegal gambling business in *Conley* was money that remained after the bets were collected and the winners were paid. *Id.*; *see also United States v. Morelli*, 169 F.3d 798, 804 (3d Cir. 1999) (explaining that "[t]he money laundering aspect of the scheme [in *Conley*] derived from the retrieval and distribution of the money deposited in the machines" after "the specified unlawful activity had been completed").[3]

The government also points out the *Febus* court's reasoning that an "illegal gambling operation . . . could not

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[3] *Conley* involved a double jeopardy challenge to the money laundering statute rather than an argument directly addressing the statutory meaning of proceeds (or financial transaction involving proceeds). Whether or not *Conley* is correct on its facts concerning the statutory meaning (*see* Part B, *infra*), those facts involved more than the core gambling business activity of collecting bet money and paying winners, which is all the government showed in this case.

grow and prosper if it did not compensate its employees and pay winners." (Pet. 21.) *See also United States v. Iacaboni*, 363 F.3d 1, 5 (1st Cir. 2004). Whether or not correctly decided, those cases addressed only whether these types of transactions satisfy the "promotion" requirement of § 1956(a)(1)(A)(i). The issue here, by contrast, is whether they are even the predicate "financial transaction[s] which in fact involve[] the proceeds of specified unlawful activity" under subsection (a)(1). A business operation which fails to collect bet money—whether because it does not "compensate its employees" to do the collection or otherwise—and which does not "pay winners," is not an illegal gambling business; it therefore is not a "specified unlawful activity."

The government might also point out that there are situations in which the money laundering transaction may occur simultaneously with consummation of the underlying crime. *See LeBlanc*, 24 F.3d at 347 (when bet money was collected after bets were lost, defendant had losing gamblers pay by checks to fictitious payees to conceal the source of the funds); *United States v. Pretty*, 98 F.3d 1213, 1221 (10th Cir. 1996) (defendant had illegal kickbacks "filtered through real estate transactions" to conceal source of money). Whether these situations are considered to involve simultaneous transactions (one the underlying criminal activity, the other money laundering) or different components of a single transaction, they involve conduct that goes beyond the mere consummation of the specified unlawful activity. No such facts are presented in this case. Again, the only financial transactions the government showed—involving the collection of bet money and paying winners—are "inseparable from the underlying crime." *Awada*, 425 F.3d at 524.

B. The "Gross Receipts Versus Net Profits" Issue Should Be Addressed in the Context of Financial Transactions That Can Constitute Money Laundering, Rather Than Only the Predicate Unlawful Activity, So All Potential Meanings May Be Explored.

The potential meanings of proceeds are not necessarily limited to "gross revenues" on the one hand and "net profits" on the other. Most obviously, "proceeds" may mean gross profits—*i.e.*, gross receipts less only direct costs—as some courts have held under the RICO forfeiture statute, 18 U.S.C. § 1963(a)(3). *See United States v. Lizza Indus.*, 775 F.2d 492, 498 (2d Cir. 1985); *United States v. Milicia*, 769 F. Supp. 877, 887-89 (E.D. Pa. 1991). This interpretation is also supported by the legislative history the government quotes, which does not adopt a "gross receipts" definition of "proceeds" but rather says that "*overhead* expenses" need not be deducted. (Pet. 13 (emphasis added) (quoting S. Rep. No. 225, 98th Cong., 1st Sess. 199 (1983)).)

Defining "proceeds" as gross profits would resolve the government's expressed concerns about a perceived "unreasonable burden of proof" and the need for "generally accepted accounting principles for criminal enterprises." (Pet. 11, 15.) The weight properly given to these contentions, however, should be evaluated in light of the many computational methods the government has been permitted to use in the absence of accounting records. *See, e.g.*, *Milicia*, 769 F. Supp. at 885-86 (discussing cases). In any event, this case does not provide a factual context in which to assess the government's concerns. Here, the government apparently made no effort to determine gross or net profits, or to show that any bet monies (not even gross revenues) were actually

"reinvested" in the ongoing illegal gambling business.[4] This despite the facts that Santos had both "records" and an accountant, from which the government showed "the income to [Santos's] bolita expanded from approximately $250,000.00 per year for the years 1989 to 1992, to $330,000.00 for 1993, and up to $410,000.00 for 1994." *Febus*, 218 F.3d at 790.[5]

The government also admittedly made no attempt to show net profits or gross profits over any period of time. (Gov't Appellant's Br. at 7.) Indeed, it may have been the government's strategy not to make such a showing, but rather to pursue a theory that the transactions constituting the underlying crime also constitute a) transactions in proceeds satisfying § 1956(a)(1), and b) promotion satisfying

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[4] The use of the term "reinvesting" in *Febus* does not provide this factual context here, as that term was used in relationship with the promotional challenge at issues in that case and was used to prove the time period requirement of § 1955 (b)(1)(iii). *Febus*, 218 F.3d at 790. The *Febus* court did speak of "plowing back proceeds" and "reinvest[ing] the bolita's proceeds. (Pet. 4, 5 (quoting 218 F.3d 789, 90).) All the court meant by these terms, however, was again runners and collectors deducting compensation from bet money and Santos and collectors paying winners. There is no showing of any other financial transaction in this case as the government has admitted. (Gov't Appellant's Br. 7.) In particular, there is no evidence of transactions that in any normal sense would be called "plowing back" or "reinvest[ment]."

[5] This increase in gross receipts was Seventh Circuit's basis for finding that compensating bet collectors and paying winners "promoted" the illegal gambling business within the meaning of § 1956(a)(1)(A)(i). *Febus*, 218 F.3d at 790. Santos disagreed with that reasoning, of course, but that is not the issue here.

§ 1956(a)(1)(A)(i). But whatever the reason, the government did not build a record for evaluating accounting issues.

Depending upon contexts that do not exist here, further refinement of the meaning of "proceeds" is possible. For example, the post-crime transactions claimed to constitute money laundering in *Scialabba* included dividing the contents of video poker machines with the owner of the business establishment to cover winnings the owner had paid to bettors. 282 F.3d at 476. Fact patterns like that pose the issue whether financial transactions in proceeds include payments for direct expenses previously incurred as part of the underlying criminal activity.[6]

This Court has previously been sensitive to the existence of issues like these and the need to address them in cases in which they are actually presented. *See Russello v. United States*, 464 U.S. 16, 29 n.3 (1983) ("In our ruling today, we recognize that we have not resolved any ambiguity that might be inherent in the terms 'profits' and 'proceeds.' Our use of those terms is not intended to suggest a particular means of calculating the precise amount that is subject to RICO forfeiture in any given case."). The instant case, in which the only financial transactions shown were those constituting the underlying criminal activity itself, is not a suitable vehicle for exploring these issues. The government asks the Court to consider the "proceeds" issue as if it involved a choice

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[6] The above issue shades into the question whether transactions with proceeds can meaningfully be said to promote *prior* specified unlawful activity under § 1956(a)(1)(A)(i)—an issue on which the circuits are split. *Compare United States v. Valuck*, 286 F.3d 221, 227 n.5 (5th Cir. 2002) (discussing cases on both sides of circuit split) *with* Pet. App. 10a-12a (discussing cases contrary to *Scialabba*).

between only two possible positions and an answer that must apply uniformly regardless of context—*i.e.*, "proceeds" is either gross receipts or net profits, period. (*See* Pet. I.) As shown, however, other alternatives exist which cannot be explored on these facts.

Moreover, the general issue of whether "proceeds" in § 1956(a)(1) means "gross receipts . . . or only the profits," (Pet. I), is both more difficult and more complex than the government's Question Presented makes it appear. In addition to the alternative meanings of "proceeds" discussed above, the court in *Scialabba* concluded, on nearly identical facts as presented here, that proceeds means profits, at least when a case involves "voluntary, business-like operations." 282 F.3d at 475. At a minimum, this includes conducting an illegal gambling *business*. But regardless of the extent of *Scialabba*'s holding, when a business-like activity is being conducted (as here), a profits definition of proceeds both is correct and avoids the concerns cited by the court in *Scialabba*. Thus, and if not universally so at least in the context of running an illegal gambling business, a profits definition is both "well-argued and intuitively appealing." *United States v. Grasso*, 381 F.3d 160, 167 (3d Cir. 2004).

For all the foregoing reasons, this is not a good case for the Supreme Court to address the meaning of "proceeds" as a stand-alone issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 06-1005

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

EFRAIN SANTOS AND BENEDICTO DIAZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

In this case, the Seventh Circuit reaffirmed its holding in *United States* v. *Scialabba*, 282 F.3d 475, cert. denied, 537 U.S. 1071 (2002), that the word "proceeds" in the principal federal money laundering statute means "profits" rather than "gross receipts." As the government has explained in its petition for a writ of certiorari, the court's decision squarely conflicts with subsequent decisions of two other courts of appeals and cannot be reconciled with the results and reasoning in numerous other money laundering cases. The decision also poses serious obstacles to effective enforcement of the money laundering statute. It removes a large class of routinely-prosecuted cases from the statute's reach. It subjects the government to an unreasonable burden of proof in all other money laundering cases, and it enmeshes the courts in intractable disputes over the accounting principles that should govern illegal enterprises. Furthermore, the court of appeals' construction of the term "proceeds" is contrary to its most common

meaning, as well as the meaning that Congress gave the same term in related statutes, including one enacted just two years before the money laundering statute. Respondents have not refuted any of those fundamental submissions. Accordingly, this Court's review is warranted.

A. The Court Of Appeals' Decision Conflicts With Decisions Of Other Courts Of Appeals

Respondents do not dispute that the Seventh Circuit's decision squarely conflicts with the First Circuit's decision in *United States* v. *Iacaboni*, 363 F.3d 1, cert. denied, 543 U.S. 978 (2004), and the Third Circuit's decision in *United States* v. *Grasso*, 381 F.3d 160 (2004), vacated and remanded on other grounds, 544 U.S. 945 (2005), reinstated in relevant part, Nos. 03-1441 & 03-1442 (3d Cir. May 20, 2005). Nor do they deny that the Seventh Circuit's reasoning and result is at odds with the Eighth Circuit's decision in *United States* v. *Huber*, 404 F.3d 1047, 1058 (2005), and the Sixth Circuit's adoption of a "total revenue" definition of "proceeds" in *United States* v. *Haun*, 90 F.3d 1096, 1101 (1996), cert. denied, 519 U.S. 1059 (1997).

Diaz nonetheless argues (Br. in Opp. 12-13) that the Court should deny review because it denied review in *Iacaboni* and *Grasso*. But that argument overlooks that the government opposed review in those cases because they presented unsuitable vehicles for deciding the "proceeds" issue, not because the conflict did not warrant this Court's resolution. In particular, the government argued that *Iacaboni* was an unsuitable vehicle because the defendant had challenged only a forfeiture order, not his underlying money laundering conviction, and he may have waived his claim by pleading guilty to the laundering charge. U.S. Br. in

Opp. at 11-13, *Iacaboni* v. *United States*, 543 U.S. 978 (2004) (No. 04-183). In *Grasso*, the government argued that the defendant could not prevail even if "proceeds" meant "profits" because his claim was subject to plain error review. The government also noted that review would be premature because the government was seeking initial en banc review in this case. U.S. Br. at 10-14, *Grasso* v. *United States*, 544 U.S. 945 (2005) (No. 04-858). This case presents none of the vehicle problems that justified denying review in *Iacaboni* and *Grasso*.

Both respondents argue (Santos Br. in Opp. 6, 12; Diaz Br. in Opp. 13) that this case has a vehicle problem of its own: They contend that the "proceeds" issue is not determinative of the outcome because their conduct did not amount to money laundering under any definition of "proceeds." They base that contention on the further claim that the alleged laundering transactions were constituent parts of the underlying gambling offense. Respondents' argument is incorrect, for two reasons.

First, respondents' contention that their money laundering transactions were components of the underlying offense was not a basis on which relief was granted by either court below, and that contention could not provide an alternative ground to support the court of appeals' judgment. Respondents did not raise the claim in their Section 2255 motions, and they would be barred from raising that claim in a second or successive motion. See 28 U.S.C. 2255 para. 8. Diaz did raise the related claim that his receipt of compensation "did *not* promote" the underlying gambling activity, Diaz Mem. of Law in Supp. of 28 U.S.C. 2255 Mot. 12, but he did not raise the claim he now makes that the money laundering transactions were "integral parts" of the underlying offense. Br. in Opp. 13. Even if one read his promotion

claim to encompass that issue, he still could not obtain relief from the Seventh Circuit on that basis, because that court previously rejected a virtually identical claim by Santos. See *United States* v. *Febus*, 218 F.3d 784, 789-790 (rejecting argument that the payments to the collectors did not constitute money laundering because they were "essential transactions of the illegal gambling business"), cert. denied, 531 U.S. 1021 (2000).

Second, respondents' contention that the charged money laundering transactions were not distinct from the underlying gambling offense is incorrect. Courts have held that the distinction between a money laundering transaction and the underlying crime is generally maintained by requiring that the laundering transaction "follow and * * * be separate from any transaction necessary for the predicate offense to generate proceeds." *United States* v. *Mankarious*, 151 F.3d 694, 706 (7th Cir.), cert. denied, 525 U.S. 1056 (1998). In this case, the illegal gambling operation generated proceeds when the bettors placed the wagers with the runners. Santos's payments to the runners, collectors, and winners were separate transactions that followed the transactions that generated those proceeds.

Respondents mistakenly assert (Santos Br. in Opp. 6; Diaz Br. in Opp. 13) that the payments to the runners, collectors, and winners were integral or constituent elements of the underlying gambling offense. The underlying offense charged in the indictment was the conduct of a gambling business in violation of 18 U.S.C. 1955. Indictment counts 3-4. Nothing in Section 1955 makes the payment of employees or winners an element of the offense. The Section 1955 offense was, in turn, predicated on violations of various Indiana gambling statutes, including Ind. Code Ann. § 35-45-5-3(a)(6)

(LexisNexis 2004), which makes it a crime to "accept * * * for profit, money * * * risked in gambling," and Ind. Code Ann. § 35-45-5-3(a)(4) (LexisNexis 2004), which makes it a crime to "sell chances" in lotteries. Indictment count 2. Under the plain language of those provisions, a gambling offense is complete once the wager is placed. Subsequent payments to employees and winners are not elements of the offense. Otherwise, defrauding employees or successful bettors would provide a defense—and that cannot be the case.

Respondents also incorrectly suggest (Santos Br. in Opp. 10; Diaz Br. in Opp. 13) that the salary payments were not transactions distinct from the underlying gambling offense because the employees took their salaries from the money they collected before turning it over to Santos, instead of being paid by Santos after giving him the money. It makes no difference for purposes of the money laundering statute which method of payment Santos employed. Each employee's removal of his salary from the gross amount he collected (as previously arranged with Santos) was a financial transaction that followed and was separate from the underlying gambling offense. Respondents have thus failed to demonstrate that this case is not a suitable vehicle for resolving the conflict among the courts of appeals on the meaning of "proceeds."

B. The Question Presented Is Of Recurring Importance

Respondents have also failed to rebut the government's showing that the question presented is of recurring importance. They do not dispute that the Seventh Circuit's rule precludes money laundering prosecutions based on financial transactions by criminals to pay the expenses of their illegal enterprises. Santos also does

not dispute that the rule presents serious practical problems for other money laundering prosecutions. And Diaz concedes the rule may present "difficulties in proof * * * in individual cases." Br. in Opp. 10. Diaz nonetheless argues (*id.* at 5, 7-10) that the government has not demonstrated that the rule actually impairs money laundering enforcement efforts. That is incorrect.

Prosecutions based on the payment of the expenses of criminal enterprises have historically constituted a large percentage of all money laundering cases. Pet. 17-19 & n.3. Diaz concedes that prosecutions on that basis "would be excluded under *Scialabba*." Br. in Opp. 9. Although he speculates that the government might still be able to prosecute expense cases by relying on other, non-expense transactions, he does not provide any support for that speculation. *Ibid.* In fact, non-expense transactions are likely to be more difficult to identify and to prove, particularly under *Scialabba*, which requires proof that they involved "profits," and not just gross receipts, of the criminal enterprise. In any event, the fact remains that *Scialabba*'s preclusion of prosecutions based on expense payments dramatically curtails the scope of the money laundering statute as it has been traditionally understood.

Diaz contends (Br. in Opp. 5, 7) that the government has not identified any case in which the *Scialabba* rule has actually interfered with a money laundering prosecution. On the contrary, the rule resulted in the reversal of money laundering convictions in both *Scialabba* and this case. It is not surprising that there have been no other reversals of convictions in the Seventh Circuit since *Scialabba*, because the government generally adheres to circuit law in deciding whether to prosecute. As for cases in other circuits, the rule would have prevented

the prosecutions in *Iacaboni*, *Grasso*, and *Huber* if it had been adopted by the courts that decided those cases.

The *Scialabba* rule also impedes effective prosecution of those money laundering cases that it does not categorically preclude. *Scialabba* requires the government to prove the existence of "profits," but criminals rarely keep accurate accounting records, and it is not clear what accounting principles courts should apply to determine whether an illegal enterprise has made "profits" for money laundering purposes. Pet. 11-12, 15-17. Although Diaz notes (Br. in Opp. 6, 8) that the government recovered some financial records in this case, nothing suggests that those records were sufficiently comprehensive or accurate to prove that respondents' gambling business made a profit. Moreover, the fact that respondents kept some records does not establish that criminal enterprises in general keep the kinds of records necessary for the government to meet its burden under *Scialabba*. On the contrary, both Congress and the courts, including the Seventh Circuit, have noted the "extreme difficulty in this conspiratorial, criminal area of finding hard evidence of net profits." S. Rep. No. 225, 98th Cong., 1st Sess. 199 n. 24 (1983) (quoting *United States* v. *Jeffers*, 532 F.2d 1101, 1117 (7th Cir. 1976), aff'd in part and vacated in part, 432 U.S. 137 (1977)); see *Grasso*, 381 F.3d at 169 n. 13; Pet. App. 13a.

Diaz asserts that the lack of accounting principles for illegal businesses is not a problem because courts can apply "the same basic 'accounting principles' whether a business is lawful or unlawful." Br. in Opp. 8. But even where criminals keep financial records, their format is unlikely to conform to generally accepted accounting principles (GAAP). Legal businesses are required by various statutes and regulations to follow particular ac-

counting methods for tax and financial reporting purposes, *e.g.*, 26 U.S.C. 441-448 (2000 & Supp. IV 2004); 15 U.S.C. 77s(b), 7218 (Supp. IV 2004); 17 C.F.R. 210.4-01(a)(1), but there is no reason to believe that illegal businesses will follow those methods. Furthermore, Diaz's assertion rests on the mistaken premise that one, uniform set of accounting rules applies in all contexts. On the contrary, not all businesses are legally required to keep their books according to GAAP, see Robert N. Anthony et al., *Accounting: Text and Cases* 11 (12th ed. 2007), and GAAP does not always require identical accounting treatment of identical transactions, see *Thor Power Tool Co.* v. *Commissioner*, 439 U.S. 522, 544 (1979). Moreover, the rules governing financial accounting frequently differ from those governing tax accounting. See Stephen F. Gertzman, *Federal Tax Accounting* ¶ 1.01[4], at 1-5 (2d ed. 1993); *id.* ¶ 2.02[2][c], at 2-28 to 2-29. Thus, under the Seventh Circuit's decision, courts will have to choose among sometimes conflicting accounting rules, without any guidance on which rule to apply for measuring illicit profit. It is unlikely that Congress would have made criminal liability turn on such difficult and uncertain determinations.

C. The Decision Of The Court Of Appeals Is Incorrect

Respondents have also failed to refute the government's showing that the decision of the court of appeals is incorrect. Diaz notes (Br. in Opp. 10-11) that secondary definitions in some dictionaries indicate that "proceeds" can sometimes mean "profits." But that does not undermine the government's fundamental point: The most common meaning of "proceeds" is "gross receipts," and this Court generally presumes that Congress has used a word in accordance with its primary meaning

unless there are contrary indications in the relevant statute. See Pet. 12-13 (citing *Muscarello* v. *United States*, 524 U.S. 125, 128 (1998)). Here, nothing in the money laundering statute suggests that Congress intended a different meaning, and the statutory context confirms that "proceeds" means "gross receipts." As discussed above, a contrary interpretation would create serious enforcement problems. Moreover, Congress used "proceeds" to mean "gross receipts" in several related statutes, including in the Racketeer Influenced and Corrupt Organizations (RICO) forfeiture statute, which Congress amended just two years before it enacted the money laundering statute. Pet. 13-14. The legislative history of that statute confirms that Congress used the word "proceeds" "in order to alleviate the unreasonable burden on the government of proving net profits." S. Rep. No. 225, *supra*, at 199. There is no reason to believe that Congress took a different approach when it enacted the money laundering statute shortly thereafter and also used the term "proceeds."

Diaz points out (Br. in Opp. 11) that the Seventh Circuit has construed "proceeds" in the RICO forfeiture statute to mean "net profits," in harmony with its construction of the term in the money laundering statute. But that shows only that the Seventh Circuit has been consistent in its errors of statutory interpretation. Its interpretation of the RICO forfeiture statute is contrary both to the statute's clear legislative history and to the interpretation of the statute adopted by every other court of appeals. See Pet. 13 (citing cases).

Diaz also argues (Br. in Opp. 12) that "proceeds" cannot mean "gross receipts" or "gross revenue" in the money laundering statute because Congress has used those specific terms in certain other statutes. That ar-

gument is incorrect. First, it proves too much. The logic behind the argument dictates that "proceeds" also cannot mean "profits," as the Seventh Circuit has held, because Congress has used that term in some statutes. See 18 U.S.C. 2318(f)(2)(C)(ii)(I) and (3)(A)(ii) (Supp. IV 2004); 18 U.S.C. 2520(c)(2)(A). Second, this Court has expressly rejected the argument, recognizing that Congress sometimes uses different terms in different statutes even though it intends those terms to have a common meaning. See *Limtiaco* v. *Camacho*, No. 06-116 (Mar. 27, 2007), slip op. at 5-7 ("tax valuation" in 48 U.S.C. 1423a means "assessed valuation" even though Congress used "assessed valuation" in another statute).

Finally, in light of the clear support for the "gross receipts" definition of "proceeds," Diaz's reliance (Br. in Opp. 15) on the rule of lenity is misplaced. The rule of lenity applies only if there is such a "grievous ambiguity" in a statute that, "after seizing everything from which aid can be derived, [the Court] can make no more than a guess as to what Congress intended." *Muscarello*, 524 U.S. at 138-139 (internal quotation marks and ellipsis omitted). There is no ambiguity here.

* * * * *

For the foregoing reasons, and the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

APRIL 2007

No. 06-1005

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

EFRAIN SANTOS AND BENEDICTO DIAZ, RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

The principal federal money laundering statute, 18 U.S.C. § 1956(a)(1), makes it a crime to engage in financial transactions using the "proceeds" of certain specified unlawful activities with the intent to promote those activities or to conceal the proceeds. The question presented is whether "proceeds" refers to the gross receipts generated by the unlawful activities or only the profits, i.e., gross receipts less expenses.

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SUMMARY OF ARGUMENT

The money laundering statute's language, context, and legislative history all support an interpretation of the term "proceeds" as "profits," not "gross receipts." Moreover, insofar as any ambiguity remains after all relevant matters are considered, the rule of lenity requires the narrower "profits" interpretation.[1]

A. The government selectively quotes dictionary definitions of "proceeds" as "gross receipts," but when fully and fairly examined, dictionary definitions encompass both alternative meanings, "profits" as well as "gross receipts." Neither meaning clearly predominates over the other. Dictionaries, therefore, are inconclusive.

The government points to a variety of other statutes that use "proceeds" as meaning "gross receipts," but those statutes operate in different contexts and

---

[1] 18 U.S.C. § 1956 provides in relevant part:

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

(A)(i) with the intent to promote the carrying on of specified unlawful activity . . . ; or

(B) knowing that the transaction is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity . . .

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

for different purposes. Congress's use of various terms—including "proceeds," "gross receipts," "gross revenue," and "gross proceeds"—has been unsystematic at best. Notably, the government overlooks the use of "gross revenue" (a synonym for "gross receipts") in the U.S. Code provision that immediately precedes the money laundering statute—18 U.S.C. § 1955, the illegal gambling statute, which defines the predicate offense in this very case. The existing reference to "gross revenue" in Section 1955 provided a conspicuous model for Congress when it created the money laundering offense in Section 1956, yet Congress avoided the term "gross revenue" (or "gross receipts") and chose "proceeds" instead. The government simply ignores that fact while venturing into other, more remote legislative contexts.

The government also ignores the context provided by the money laundering statute itself, and particularly its use of the word "promote." This case involves the statute's "promotion" branch, which prohibits transactions in "proceeds" "with the intent to promote the carrying on of specified unlawful activity." 18 U.S.C. § 1956(a)(1)(A)(i). Unlike the word "proceeds," "promote" has a clear, unambiguous meaning: to expand or increase. The meaning of "promote" conflicts with the government's argument that "promotion" money laundering encompasses expense payments that merely carry out or sustain the underlying illegal activity (for example, the redemption of winning bets or the payment of employee salaries in an illegal gambling enterprise). Expansion of a business takes place when funds that can be extracted from the business and deployed elsewhere—i.e., funds remaining *after* business expenses have been paid—are instead plowed back into the business

through reinvestment. Funds that remain after expenses have been paid are profits, not gross receipts.

The concept of expansion also is consistent with the "concealment" branch of the money laundering statute, which prohibits transactions designed "to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(1)(B)(i). Payments of routine business expenses are not designed to conceal the tainted nature, location, source, ownership, or control of the funds involved. Such payments actually tend to *widen* rather than conceal the trail that investigators can detect and follow back to the source, because the expenses in question are generated by, and hence directly connected to, the predicate offense. Consequently, a proper interpretation of the statute's "concealment" branch focuses on money that has been extracted from an unlawful business and placed elsewhere to conceal its source. Again, money that can be extracted from a business and placed elsewhere represents profits, not gross receipts.

B. An interpretation that focuses on profits rather than gross receipts is also supported by the money laundering statute's legislative history. The government conspicuously fails to address that history; it delves instead into the legislative histories of various other statutes that have no direct bearing on the question presented. The Congressional reports and floor debates regarding Section 1956 are replete with references to the "profits" of burgeoning criminal enterprises. Such enterprises were clearly the focus of Congress's concern, not "inept," profit-less criminals now hypothesized by the government. Br. 25.

C. As its final support for a "gross receipts" interpretation, the government cites two speculative and overstated concerns about the practical difficulties of proving profits in money laundering cases.

First, the government argues that criminals will avoid creating a paper trail (or will manipulate any existing trail) to frustrate proof of profits. But criminals have ample incentives to cover their tracks under any standard of proof, and the government has repeatedly demonstrated its ability to prosecute complex financial crimes successfully, despite sophisticated cover-ups. The government also suggests that records will be non-existent or inadequate by positing contrived hypotheticals involving violent crimes such as bank robbery. The government thus glosses over the fact that most money laundering cases involve non-violent, transactional offenses, which often leave a variety of records in their wake. The facts in this case vividly illustrate the point. The government recovered a trove of ledgers, betting slips, and other financial documents, including records maintained by the gambling enterprise's *accountant*. At a post-trial hearing, the government even estimated the profits realized by the enterprise (although the government never purported to show that profits were used in any money laundering transactions).

Second, the government speculates that a "profits" interpretation will force courts to develop an entirely new set of accounting methods and principles for illegal businesses. But legal and illegal businesses are no different in principle with respect to accounting issues; both types of enterprise raise similar questions concerning relevant time periods, relevant transactions, and appropriate accounting methods. As the government concedes, "there is no one, uniform set of accounting principles that applies in all

contexts, even for lawful businesses." Br. 33. In fashioning money laundering charges, the government has broad discretion to define the relevant activities and to select any reasonable accounting method for proving profits. Indeed, the profits of criminal enterprises are routinely established in sentencing and forfeiture proceedings.

D. While speculating about its own burdens under a "profits" interpretation, the government ignores the very real and unjustifiable burdens its "gross receipts" interpretation imposes on defendants. The government's position effectively merges money laundering with the underlying offense in a wide range of cases and thus ratchets up sentences automatically. In illegal gambling cases, for example, the government's position converts every instance of illegal gambling into a money laundering offense and consequently *quadruples* the available sentence, from 5 years to 20 years. Nothing in the money laundering statute's language, context, or legislative history suggests that Congress intended such draconian results. The absurd consequences of the government's position militate strongly against its acceptance.

E. Given all of the preceding considerations, the government has failed to show that its "gross receipts" interpretation is "unambiguously correct." *United States* v. *Granderson*, 511 U.S. 39, 54 (1994). Thus, even if a "profits" interpretation remains uncertain as well, the rule of lenity requires that narrower interpretation.

ARGUMENT

The Money Laundering Statute's Language, Context, And Legislative History Support The Interpretation Of "Proceeds" As "Profits," Not "Gross Receipts." Insofar As Any Ambiguity Remains, The Rule Of Lenity Requires The Narrower "Profits" Interpretation.

The issue presented here was first addressed specifically in *United States* v. *Scialabba*, 282 F.3d 475 (7th Cir.), cert. denied, 537 U.S. 1071 (2002). There the Seventh Circuit arrived at the common-sense conclusion that "proceeds" in the money laundering statute should be limited to profits—i.e., funds remaining after the payment of expenses—because "otherwise the predicate crime merges into money laundering (for no business can be carried on without expenses) and the word 'proceeds' loses operational significance." 282 F.3d at 475. Other circuits have expressly disagreed with *Scialabba* but have not undermined its reasoning. See *United States* v. *Grasso*, 381 F.3d 160, 166-68 (3d Cir. 2004), vacated and remanded on other grounds, 544 U.S. 945 (2005); *United States* v. *Iacaboni*, 363 F.3d 1, 4 (1st Cir.), cert. denied, 543 U.S. 978 (2004); see also *United States* v. *Huber*, 404 F.3d 1047, 1058 (8th Cir. 2005).

The statute's language, context, and legislative history all support an interpretation of "proceeds" as meaning "profits" rather than "gross receipts." That conclusion is buttressed by the fact that, as *Scialabba* pointed out, the government's position leads to an improper merger of money laundering with the underlying offense. Insofar as any uncertainty remains, the rule of lenity requires a resolution in favor of the narrower "profits" interpretation.

A. The Money Laundering Statute's Language And Context Support A "Profits" Interpretation Of "Proceeds"

1. The Government's Selected Dictionary Definitions Are Incomplete And Inconclusive

The government selectively quotes several dictionary definitions to establish that the essential meaning of "proceeds" is "gross receipts." Br. 13-14. When fully and fairly examined, however, dictionary definitions demonstrate that "proceeds" may just as easily mean "profits."

For example, the Oxford English Dictionary's definition (tied to the singular noun form) reads in full: "That which proceeds, is derived, or results from something; that which is obtained *or gained* by any transaction; produce, outcome, *profit*. Now almost always in *pl.* **proceeds**." 12 OXFORD ENGLISH DICTIONARY ("OED") 544 (2d ed. 1989) (first two emphases added). The government misleadingly states that the OED "lists the 'gross receipts' meaning of 'proceeds' first." Br. 14. In fact, the OED's definition, just quoted in full, encompasses both meanings in virtually the same breath (and does not use the words "gross receipts" at all).[2]

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[2] As the first recorded reference to "proceeds," the OED cites Samuel Pepys's diary entry for December 11, 1665: "£350,000 sterling was coined out of the French money, the proceeds of Dunkirke." 12 OXFORD ENGLISH DICTIONARY 544. France had ceded Dunkirk to England in 1658; England sold it back to France in 1662. 4 CHAMBERS ENCYCLOPAEDIA 669 (rev. ed. 1973). "The purchase money was brought over in French coin and reminted at the Tower." A. Feavearyear, THE POUND STERLING: A HISTORY OF ENGLISH MONEY 95 (2d ed.

In this and other instances, the government quotes dictionary definitions of "proceeds" only partially, systematically omitting the alternative "profits" definition even when the two meanings are provided together or in close proximity. For example, the government omits Random House's alternative definition of "proceeds" as "the *profits* or returns from a sale, investment, etc." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1542 (2d ed. 1987) (emphasis added). Likewise, the government omits Webster's alternative definitions of "proceeds": "the *net profit* made on something <took the [proceeds] from the sale of his business and invested in stocks>"; and "the *net sum* received (as for a check, a negotiable note, an insurance policy) after deduction of any discount or charges." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1807 (1993) (emphasis added).[3]

1963). It is unclear whether the amount stated by Pepys represents the total purchase price (gross receipts) or reflects an adjustment for transportation, reminting, or other costs (net profits). Thus, ambiguity in the term "proceeds" can be traced back to its first recorded usage (which involved, figuratively speaking, an instance of royal money laundering).

[3] In addition, the government inadvertently supports a "profits" interpretation by quoting definitions that incorporate the concept of "accrual." The government quotes Random House's reference to "something that results or *accrues*," and Webster's reference to "That which results, proceeds, or *accrues* from some possession or transaction." Br. 13, 14 (emphases added). The word "accrue," however, strongly connotes profit or gain. See, e.g., RANDOM HOUSE UNABRIDGED DICTIONARY 13 (2d ed. 1993) ("1. to happen or result as a natural *growth*, *addition*, etc. 2. to be added as a matter of periodic *gain* or advantage, as *interest on money* . . .") (emphasis added); 1 OXFORD ENGLISH DICTIONARY 90 ("1. To fall (*to* any one) as a natural growth

The linkage or close proximity of the two definitions is significant. In *Muscarello* v. *United States*, 524 U.S. 125 (1998), the Court turned first to the OED for guidance in construing the word "carry" in 18 U.S.C. § 924(c)(1) (which imposed a mandatory five-year sentence for "carr[ying]" a gun in connection with certain drug crimes). In adopting the government's definition, the Court emphasized that it was the first one provided by the OED while the defendants' narrower definition was a distant *twenty-sixth*. *Id.* at 128, 130.

No such disparity exists here. In contrast with *Muscarello*, the government's preferred definition of "proceeds" does not clearly predominate over the alternative. Even where dictionaries list a "gross receipts" definition first, a "profits" definition typically follows so closely that further interpretive tools must be applied. Consequently, as the Third Circuit concluded (in a case relied on by the government), dictionary definitions are "neither uniform nor dispositive" for purposes of construing the term "proceeds" in the money laundering statute. *Grasso*, 381 F.3d at 167; see also *Trustees of the Chicago Truck Drivers, Helpers & Warehouse Workers Union (Independent) Pension Fund* v. *Leaseway Transportation Corp.*, 76 F.3d 824, 828 n.4 (7th Cir. 1996) ("[T]he relative order of the common dictionary definitions of a single term does little to clarify that term's meaning within a particular context. When a word has multiple definitions, usage determines its meaning."); cf. *Moskal* v. *United States*, 498 U.S. 103, 116-17 (1990) (al-

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or increment, to come by way of addition or increase, or as an accession or advantage. . . . **2.** To arise or spring as a natural growth or result. . . . *Esp.* of interest: To grow or arise as *the produce of money invested*.") (final emphasis added).

though a common-law term generally carries its established meaning when used in a statute without further definition, that principle does not apply when the term has *more than one* common-law meaning: "we think it more appropriate to inquire which of the common-law readings of the term best accords with the overall purposes of the statute rather than to simply assume, for example, that Congress adopted the reading that was followed by the largest number of common-law courts").

2. The Government's Discussion Of Other Statutes Fails To Support Its Interpretation And Ignores The Critical Importance Of Context

This Court has recognized that where a statutory term does not have a clear, single meaning on its face, the next step is to consider its context. "[T]he meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal* v. *United States*, 508 U.S. 129, 132 (1993). "Statutory construction is a holistic endeavor and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter." *United States Nat'l Bank* v. *Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993) (internal quotation marks and citations omitted).

a. The statute that immediately precedes the money laundering statute in the U.S. Code, 18 U.S.C. § 1955, defines the very "unlawful activity"—illegal gambling—that generated the supposed "proceeds" in this case. (Under subsection (c)(7) of the money laundering statute, "specified unlawful activity" includes the activities listed in 18 U.S.C. § 1961(1), which in turn includes "illegal gambling businesses" prohibited

by 18 U.S.C. § 1955.) Section 1955 defines an "illegal gambling business" as a business that "has been or remains in substantially continuous operation for a period in excess of thirty days or has a *gross revenue* of $2,000 in any single day." 18 U.S.C. § 1955(b)(1)(iii) (emphasis added). Section 1955 has incorporated that reference to "gross revenue" since the statute's enactment in 1970. It thus provided a conspicuous model when Congress created the offense of money laundering in the very next section of the U.S. Code. The opinion below draws specific attention to that language. Pet. App. 15a n.5. Nevertheless, apart from a single glancing reference when reciting the elements of illegal gambling generally (Br. 41), the government ignores the presence of "gross revenue" in Section 1955.

b. Other criminal statutes also use the term "gross revenue" or "gross receipts," thereby leaving no doubt as to Congress's intent. See, e.g., 18 U.S.C. § 225(a)(2) ("gross receipts"); 18 U.S.C. §§ 1511(b)(1)(iii) & (c) ("gross revenue"); 21 U.S.C. § 848(b)(2)(B) ("gross receipts"); 21 U.S.C. § 856(d)(1)(B) ("gross receipts"). The government overlooks these references. Instead, it concentrates on certain *forfeiture* provisions that appear to use "gross receipts" and "proceeds" interchangeably. Br. 18-20 nn.1&2. As the government's own summary shows, however, Congress has used "gross receipts," "proceeds," and other terms unsystematically in the forfeiture context. Congress has even used the term "*gross proceeds*" on several occasions. See Br. 19 n.2 (emphasis added).[4]

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[4] The government cites references to "gross proceeds" in the Anti Car Theft Act of 1992, 18 U.S.C. § 982(a)(5); the Health Insurance Portability and Accountability Act of 1996, 18 U.S.C. § 982(a)(7); and the Telemarketing Fraud Prevention Act of 1998, 18 U.S.C. § 982(a)(8).

"Gross proceeds," of course, is redundant on the government's theory. Moreover, the government promptly forgets these statutory references to "gross proceeds" when it argues that Congress understands *unmodified* references to "proceeds" as meaning "gross receipts" and therefore would have used a *modified* reference, i.e., "net proceeds," in the money laundering statute if it meant to denote something less than gross revenue. Br. 21. Congress's use of "gross proceeds" in other statutes suggests the opposite conclusion—that Congress understands the unmodified term "proceeds" as meaning something less than gross revenue.

Similarly, the government acknowledges—but then forgets—that at times Congress has included an *express definition* of the term "proceeds" to make clear that the term should be read on those occasions as referring to gross receipts. Br. 17-18.[5] Such definitions would be superfluous, of course, if the "primary" or default meaning of "proceeds" were "gross receipts."

Given Congress's varying and inconsistent use of the terms "proceeds," "gross revenue," "gross receipts," and "gross proceeds" across a wide range of statutes, the only conclusion that can be drawn is that the word "proceeds" has no fixed or predominant meaning apart from its function and context in a particular statute. The government points out that "Congress sometimes uses different words in different statutes even though it intends those words to have the same meaning." Br. 20. That is undoubtedly true. See, e.g., *Limtiaco* v. *Camacho*, 127 S. Ct. 1413,

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[5] The government cites 18 U.S.C. § 2339C(e)(3), an anti-terrorism provision; and 18 U.S.C. § 981(a)(2)(A), a civil forfeiture provision.

1419 (2007); *Deal*, 508 U.S. at 134. But the converse is equally true: Congress sometimes uses the *same* word in different statutes—or even in the same statute—to mean different things, depending on the context. "Most words have different shades of meaning, and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section." *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932); see also *Environmental Defense* v. *Duke Energy Corp.*, 127 S. Ct. 1423, 1433 (2007) (the term "modification" had different meanings in different sections of the Clean Air Act); *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U.S. 581, 595-96 (2004) ("age" had different meanings in different sections of the Age Discrimination Employment Act); *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) ("wages paid" had different meanings in different sections of 26 U.S.C.); *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 343-44 (1997) ("employee" had different meanings in different sections of Title VII).

c. By relying on *forfeiture* statutes in particular, the government underscores its disregard for context. The money laundering statute is an offense-defining provision, while forfeiture statutes provide a certain type of remedy for already-defined offenses. Even though "proceeds" has been used occasionally in both contexts, the government improperly assumes that the term operates as broadly when defining offenses as it does when describing assets subject to forfeiture. This Court has repeatedly rejected the simplistic notion that a statutory term has the same meaning in different contexts: "The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and

should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against." *General Dynamics*, 540 U.S. at 595 n.8 (quoting Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 Yale L.J. 333, 337 (1933)); see also *Environmental Defense*, 127 S. Ct. at 1432.

The illegal gambling statute, 18 U.S.C. § 1955, illustrates the difference between offense-defining and forfeiture provisions. As noted above, subsection (b) of that statute defines the offense of illegal gambling in part by requiring that the gambling business reach a certain "gross revenue" threshold (at least $2,000 generated in a single day). 18 U.S.C. § 1955(b)(1)(iii). On the other hand, subsection (d) of the same statute provides for forfeiture of "*[a]ny property*, including money, *used* in violation of the provisions of this section." 18 U.S.C. § 1955(d) (emphasis added). Here, rather than referring again to "gross revenue," Congress employed a broader term, "property . . . used," to describe the scope of the forfeiture. Under this broader provision, assets put to use in an illegal gambling business would be subject to forfeiture even if their acquisition was entirely lawful. See, e.g., *United States* v. *Premises Known as 318 South Third Street, Minneapolis, Minnesota, Hennepin County*, 988 F.2d 822, 824 (8th Cir. 1993) (forfeiture of building used in illegal gambling); *United States* v. *On Leong Chinese Merchants Ass'n Building*, 918 F.2d 1289, 1296 (7th Cir. 1990) (same), cert. denied, 502 U.S. 809 (1991); see also *United States* v. *Heldeman*, 402 F.3d 220, 222-23 (1st Cir. 2005) (forfeiture of doctor's personal residence used in connection with drug distribution offenses); *United States* v. *Bernitt*, 392 F.3d 873, 880-81 (7th Cir. 2004) (forfeiture of residence used in marijuana offenses), cert. denied, 544

U.S. 991 (2005); *United States* v. *Bieri*, 21 F.3d 819, 824 (8th Cir.) (forfeiture of farm property used in marijuana offenses), cert. denied, 513 U.S. 878 (1994).

Here and elsewhere, forfeiture provisions sweep more broadly than the definition of the associated offense. See also 18 U.S.C. § 981(a)(1)(A) (enacted with Section 1956 and providing for civil forfeiture of "[a]ny property, real or personal, involved in a transaction or attempted transaction in violation of section 1956 . . . or any property traceable to such property"); 18 U.S.C. § 982(a)(1) (enacted with Section 1956 and providing for criminal forfeiture of "any property, real or personal, involved in [an offense under Section 1956], or any property traceable to such property"); *Huber*, 404 F.3d at 1061 (under Section 982(a)(1), funds may be subject to criminal forfeiture "even if they were not part of the money-laundering transaction").[6]

3. The Government Ignores The Context Provided By Section 1956 Itself—Particularly The Word "Promote"

In disregarding the importance of context, the government also ignores the most immediate context of all—the language of Section 1956 itself, and par-

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[6] The government's reliance on *RICO* forfeiture provisions is inappropriate on another ground as well. Congress declared a special intent that RICO be "liberally construed to effectuate its remedial purposes." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (codified at 18 U.S.C. § 1961 note). Although the list of "specified unlawful activities" in the money laundering statute includes RICO violations (among many other offenses), the money laundering statute itself is not subject to a similar directive.

ticularly the term "promote." The government fails to say anything about the definition of *that* term and its relationship to "proceeds." The meaning of "promote" conflicts with the government's position that "promotion" laundering encompasses transactions that merely continue or sustain, rather than expand or increase, the underlying illegal activity.

a. Consider, for example, the Oxford English Dictionary's definition of "promote": "To further the *growth*, development, progress, or establishment of (anything); to help forward (a process or result); to further, advance, encourage." 12 OXFORD ENGLISH DICTIONARY 616 (emphasis added).[7] Thus, in the context of an unlawful enterprise, "promotion" means an expansion of the enterprise, not merely its continuation at the break-even point, much less at a loss. A "profits" standard gives the term "promote" its proper meaning by focusing the statute on transactions that involve a reinvestment of profits, i.e., funds that could be freely extracted from the business and diverted to other uses but instead are plowed back into the business to expand it. See, e.g., *Estate of Wallace* v. *Comm'r*, 965 F.2d 1038, 1040 (11th Cir. 1992) (farm business grew by "reinvesting profits in more cattle"). In many situations, one can apply a simple, common-sense test: if the transactions in question are essential to the mere *survival* of the business,

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[7] This is the OED's second listed definition, the one most applicable to activities, enterprises, or other impersonal subjects. The OED's first definition applies to human beings: "To advance (a person) to a position of honour, dignity, or emolument; *esp.* to raise to a higher grade or office; to prefer." 12 OXFORD ENGLISH DICTIONARY 616 (emphasis in original). Both definitions embody the same fundamental concept: movement to a higher level, not just continuation at the same level.

they do not constitute a "promotion" of the business. For example, paying winners and employees their due is essential to the survival of an illegal gambling enterprise—not to mention the survival of its proprietor. Neither the enterprise nor the proprietor is likely to last very long if the amounts owed are withheld and used for other purposes.

The government ignores this important distinction between promotion and mere continuation, repeatedly conflating the two. See, e.g., Br. 23 ("The payment of the expenses of a crime commonly promotes the *continuation and expansion* of the criminal enterprise") (emphasis added). As a supposed illustration, the government cites the Seventh Circuit's earlier decision in this case, on direct appeal, in which the court described the bolita's expansion in general terms as involving payments to runners, collectors, and winners. *United States* v. *Febus*, 218 F.3d 784, 790 (7th Cir.), cert. denied, 531 U.S. 1021 (2000) (see Br. 23). In *Febus*, however, the court was never asked to define "proceeds" in terms of profits or gross receipts. The issue did not surface until *Scialabba* and subsequent cases (*Grasso*, *Iacaboni*, and the collateral proceedings in this case).[8]

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[8] In *Febus*, respondent Santos sought to overturn his conviction on direct appeal by arguing that "his cash payments to the bolita's collectors and winners were essential transactions of the illegal gambling business, and thus cannot also constitute transactions under the promotion provision of the money laundering statute." 218 F.3d at 789. In rejecting that argument, the Seventh Circuit considered the "separate transaction" issue in isolation, without reference to the appropriate definition of "proceeds." See *id.* at 789-90. The latter question was not addressed until *Scialabba*, almost two years later. Now that the government has taken the position that "proceeds" encom-

Likewise, the issue was never addressed in the long list of cases cited by the government as involving convictions for "promotion" laundering based on "expense payments." Br. 23 & n.3. The government makes no attempt to show that the facts available in those cases would have failed to support convictions under an alternative "profits" standard. Thus, the government's claim that a "profits" standard would necessarily "foreclos[e]" all such cases is unsupported. Br. 23-24. The mere fact that the government did not try to meet that standard in a series of cases does not mean that any such attempts were doomed to failure. And, in any event, this Court has not hesitated to overrule a long line of lower-court decisions that erroneously expanded a criminal statute, even when the lower courts *expressly* addressed the issue. See, e.g., *McNally* v. *United States*, 483 U.S. 350, 359 (1987).

b. The government also mistakenly argues that a "profits" standard is inappropriate because it would foreclose prosecutions under the statute's "concealment" branch whenever the funds are "used to pay the expenses of the revenue-generating crime." Br. 26-27. The government's argument gives little or no meaning, however, to the concept of "concealment" in the money laundering context. Payments of routine business expenses, such as payments to bolita winners and employees, are not designed to conceal the tainted source or nature of the funds involved. The statute requires knowledge that "the transaction is designed in whole or in part . . . to conceal or disguise

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passes even routine expense payments, it is appropriate to consider whether that position improperly undermines the "separate transaction" requirement. The government acknowledges the importance of this issue by discussing it at length. See Br. 36-42; see also Part D, *infra*.

the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(1)(B)(i). By definition, expenses are generated by and thus directly connected to the underlying offense. If anything, expense payments tend to *widen* the trail that investigators can detect and follow back to the source. Here, for example, the indictment listed the dates and precise amounts of salary payments to respondent Diaz, which were traceable back to the printing business that allegedly served as a front for the bolita. See Indictment pp. 11-12, *United States v. Jose Almeda et al.*, No. 2:96CR44 (N.D. Ind. May 10, 1996); see also *United States* v. *Rudisill*, 187 F.3d 1260, 1262-63, 1267 (11th Cir. 1999) (payroll and other expense payments aroused suspicion and led to discovery of defendants' fraud scheme); *United States* v. *King*, 169 F.3d 1035, 1039-40 (6th Cir.) (payments to couriers provided evidence of drug trafficking scheme), cert. denied, 528 U.S. 892 (1999).

Thus, a proper interpretation of the statute's "concealment" branch focuses on funds that have been extracted from an unlawful business and placed elsewhere to conceal their connection to the business. Again, money that can be extracted from a business and placed elsewhere typically represents profits, not gross receipts. See, e.g., *United States* v. *Esterman*, 324 F.3d 565, 570, 573 (7th Cir. 2003) (in "concealment" cases, "the mere transfer and spending of funds is not enough to sweep conduct within the money laundering statute"; "it is important, even if difficult at times, to ensure that the money laundering statute not turn into a 'money spending statute'"); see also *United States* v. *Garcia-Emanuel*, 14 F.3d 1469, 1475 (10th Cir. 1994) ("cases involving *invest-*

ments made with illegal proceeds are close to the core of the statute's purpose") (emphasis added).

In sum, a "profits" interpretation fits best with the meaning of the statute's two key concepts, "promotion" and "concealment." On the other hand, the government's "gross receipts" interpretation conflicts with the clear meaning of "promotion" and improperly broadens "concealment" to include routine expense payments. At the very least, it cannot be said that the statute's language and context *unambiguously* support the government's position.

B. The Legislative History Of The Money Laundering Statute Supports A "Profits" Interpretation Of "Proceeds"

While venturing far afield into other legislative realms, the government says nothing about the legislative history of Section 1956 itself. The government declares that a "profits" interpretation "would constrict the money laundering statute in significant ways that Congress could not have intended," but it fails to cite anything in the legislative history that establishes this supposed "intent." Br. 22. Instead, the government posits a series of artificial hypotheticals and simply *assumes* that Congress intended to cover all of them. The government's assumptions about Congressional intent are contradicted by numerous statements in the statute's legislative history.

Section 1956 was enacted as part of the Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207. The legislation was developed by the Senate Judiciary Committee as S. 2683. The Committee's report identifies Congress's fundamental concern: "The growth of money laundering has been a corollary of the spread of *profitable* illegal enterprises." S. Rep. No. 99-433, 99th Cong., 2d Sess. at 2

(1986) (emphasis added). The report goes on to note a statement by the Committee's chairman, Sen. Thurmond: "Creation of a money laundering offense is imperative if our law enforcement agencies are to be effective against the organized criminal groups which *reap profits* from unlawful activity by camouflaging the proceeds through elaborate laundering schemes." *Id.* at 9 (emphasis added); see also *United States* v. *Castellini*, 392 F.3d 35, 49 (1st Cir. 2004) ("It is clear from the legislative history that Congress's purpose in enacting § 1956 was to close the gap in the criminal law with respect to the post-crime hiding of the ill gotten gains") (internal quotation marks omitted); *United States* v. *Johnson*, 971 F.2d 562, 569 (10th Cir. 1992) (same). Similarly, the Congressional floor debates repeatedly refer to the use of illegal *profits* as the evil to be addressed.[9]

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[9] The following are only a selection of the many statements that focus on profits (all emphases added): 131 Cong. Rec. E2864 (daily ed. June 18, 1985) (statement of Rep. McCollum) ("As drug trafficking has increased in this nation, so have the number of seemingly legitimate business persons devoted to moving drug *profits* through the banking system"; "the purpose of money laundering is *to make illegal profits appear as legitimate income*"); 131 Cong. Rec. S8592 (daily ed. June 20, 1985) (statement of Sen. Thurmond) (the legislation "would severely restrict the ability of criminal groups to *disguise and profit from illegal gains*"); 132 Cong. Rec. H408-01 (Feb. 6, 1986) (statement of Rep. Lungren) (money launderers use banks, brokerage houses, and other financial institutions "to hide their illegal *profits*"; "crime chieftains are using a variety of techniques and a variety of locations to inject their *profits* into the American financial system"); *id.* (statement of Rep. Meyers) (money laundering "is a process by which criminals can take their illegal *profits* and give them the appearance of being earned legitimately"); 132 Cong. Rec. H408 (daily ed. Feb. 6, 1986) (statement of Rep.

As the legislative history makes clear, Congress acted in response to an alarming expansion of criminal enterprises, and the corrupt infiltration of legitimate businesses, through the deployment of illicit profits. Congress was not concerned with the payment of routine business expenses—for example, the redemption of winning bets and salary payments in an illegal gambling enterprise—and it certainly was not concerned with the marginal cases now hypothesized by the government, such as the "inept criminal who never manage[s] to earn a profit." Br. 25.

Notably, the government itself has acknowledged the statute's profit-oriented approach. The Department of Justice told Congress in 1996:

> Congress constructed these new money laundering statutes [18 U.S.C. §§ 1956 and 1957] to apply not only to those who generate criminal proceeds but to all those who engage in a financial or monetary transactions [sic] with the requisite knowledge that the proceeds involved were derived from illicit *profits*. These statutes are intended to curb the flow of illicit *profits* back to the unlawful enterprises that created such proceeds. Thus, this process is designed to prevent the *capitalization and expansion* of criminal activity . . .
>
> * * * *

McCollum) ("If we can get at the *profit*, if we can make it too expensive for the big money, organized criminals to get involved and to continue this high-level operation, we can make a very significant impact on the entire process"); 132 Cong. Rec. S14270 (daily ed. Sept. 30, 1986) (statement of Rep. DeConcini) ("we will make it more difficult for drug dealers to keep the *profits* of their criminal activities").

> In general, the money laundering statutes are to be used to identify and prosecute the financial component of *for-profit* criminal activity, including attempts to *conceal or reinvest* criminal proceeds. They should not be used in cases where the money laundering activity is minimal or incidental to the underlying crime . . . .

U.S. Department of Justice, *Report for the Senate and House Judiciary Committees on the Charging and Plea Practices of Federal Prosecutors With Respect to the Offense of Money Laundering* 5, 14 (June 17, 1996) (emphasis added).

C. The Government's Predictions That A "Profits" Interpretation Will Create Intractable Evidentiary And Accounting Problems Are Unsubstantiated

The government predicts that a "profits" standard will create a host of "practical problems" for money laundering prosecutions. Br. 27-35. Its predictions, however, remain abstract and hypothetical. The government apparently has never tried to meet a "profits" standard in actual money laundering cases. The government simply asks the Court to assume that prosecutions that succeed under the "gross receipts" standard will systematically fail under a "profits" standard. Although profits may be more difficult to prove in particular cases, that by itself is not a sufficient reason to expand the scope of this (or any other) criminal statute beyond the limits indicated by its language, context, and legislative history. Moreover, the government sells itself short. Its ability to overcome problems of proof in much more complicated cases has been demonstrated repeatedly. In fact, the government routinely establishes the profits gener-

ated by illegal enterprises in other contexts such as sentencing and forfeiture.

1. The Government Overstates The Evidentiary Problems In Money Laundering Cases And Ignores The Real-World Circumstances In Which Such Cases Often Arise

The government argues that criminal enterprises rarely keep complete and accurate financial records. Br. 28-29. That argument, however, proves far too much. The incentive to avoid creating a paper trail, or to manipulate whatever trail is created, exists in every criminal case. Indeed, criminals who act on that incentive often *bolster* the government's case. For example, "concealment" money laundering requires proof of a design to "conceal or disguise." 18 U.S.C. § 1956(a)(1)(B)(i). The government has acknowledged elsewhere that proof of the design element actually becomes *easier* when money launderers take elaborate steps to avoid creating a paper trail: "the more convoluted the transaction, the easier it is to infer a design to conceal or disguise." Brief for the United States in Opposition at 11, *Cuellar* v. *United States*, No. 06-1456 (filed Aug. 3, 2007); see also *United States* v. *Ness*, 466 F.3d 79, 81 (2d Cir. 2006) (proof of the design element turns on the "level of secrecy" involved and gains support from techniques such as avoidance of a paper trail and use of coded communications), cert. petition pending, No. 06-1604. In addition, the Sentencing Guidelines specifically provide a two-level enhancement for "sophisticated laundering," defined as "complex or intricate offense conduct pertaining to the execution or concealment" of the money laundering offense. U.S. Sentencing Commission, *Guidelines Manual* § 2S1.1(b)(3) & cmt. n.5(A) (West 2007) ("Guidelines").

In case after case, the government has shown its ability to prosecute complex financial crimes even when criminals employ the most sophisticated techniques to cover their tracks. See, e.g., *United States* v. *Nguyen*, 2007 WL 2083708, at *1 (5th Cir. July 23, 2007) (affirming money laundering convictions arising from "complicated" real estate mortgage scheme); *United States* v. *Gotti*, 459 F.3d 296, 338 (2d Cir. 2006) (affirming money laundering convictions where money transfers were "highly complex and surreptitious"), cert. denied, 127 S. Ct. 3001 (2007); *United States* v. *McClain*, 377 F.3d 219, 220-21 (2d Cir. 2004) (affirming money laundering convictions arising from "elaborate" and "complicated" fraudulent investment scheme); *United States* v. *Jackson-Rudolph*, 282 F.3d 369, 375, 387 (6th Cir. 2002) (affirming money laundering conviction arising from "sophisticated scheme"); *United States* v. *Prince*, 214 F.3d 740, 750-53 (6th Cir.) (affirming money laundering conviction arising from elaborate wire fraud scheme designed to avoid paper trail), cert. denied, 531 U.S. 974 (2000).

Nevertheless, the government predicts that records will be inadequate in money laundering cases while telling the Court virtually nothing about the real-world circumstances in which such cases typically arise. For example, the government repeatedly relies on contrived hypotheticals involving *bank robbery*. Br. 27, 29-30, 31, 37, 40. That is clearly not the type of crime that Congress had in mind when the money laundering statute was enacted, as shown by the legislative history discussed above. Nor is bank robbery the type of crime that figures prominently in real-life money laundering schemes. (Indeed, the government's brief fails to cite a single money laun-

dering prosecution in which bank robbery was the underlying offense.)[10]

Actual money laundering cases are overwhelmingly associated with non-violent, transactional offenses such as embezzlement, bank fraud, and counterfeiting, in which ongoing activity tends to generate business records or other financial evidence. A comprehensive study issued by the Department of Justice in 2003 shows that "violent offenses"—defined as bank robbery and kidnapping—were involved in only 1.6% of the money laundering cases brought under Section 1956 in 2001 (the most recent year examined). U.S. Department of Justice, Bureau of Justice Statistics, *Money Laundering Offenders 1994-2001*, at 6, Table 2 (2003), http://www.ojp.usdoj.gov/bjs/pub/pdf/mlo01.pdf (last visited Aug. 18, 2007). In stark contrast, transactional offenses accounted for the vast majority of money laundering cases. Almost half (47.1%) arose from pure "property offenses," e.g., embezzlement, bank fraud, bankruptcy fraud, and counterfeiting—the largest single category by far. *Id.* The study also shows that the majority of money laundering cases were generated by agencies within the Department of the Treasury, particularly the U.S. Customs Service and the Internal Revenue Service.

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[10] At one point, the government makes the bizarre suggestion that Section 1956 must apply to unprofitable activities because "a profitable bank robbery may be accomplished without violence, while an unprofitable one may involve the murder of a bank guard or a customer." Br. 27. In the latter case, of course, the primary concern of everyone—Congress, courts, prosecutors, and society at large—would be murder, not money laundering. Prosecutors have ample tools besides the money laundering statute to deal with violent but "unprofitable" crimes.

Id. at 4. Those agencies tend to generate cases in which documents abound.[11]

Likewise, records abounded in this case. The government recovered a trove of "ledgers," "betting sheets, betting slips, cash, and other evidence of [defendants'] illegal Bolita." Pet. App. 19a, 20a. It even recovered the records maintained by the bolita's *accountant*. See Brief for the United States at 5, *Benedicto Diaz* v. *United States*, No. 05-2316 (7th Cir.) (filed June 21, 2005). The government has never even attempted to demonstrate that the records here were inadequate to support the basic calculations necessary to prosecute the case under a "profits" standard. In fact, at a post-trial custody hearing, the government purported to estimate the bolita's profits. See Tr. 2180-81, *United States v. Jose Almeda et al.*, No. 2:96CR44 (N.D. Ind. Oct. 16, 1997). (However, the government never purported to prove any *money laundering transactions* involving profits. It is undisputed that the only transactions at issue in this case involved gross receipts.)

Other money laundering cases exhibit a similar abundance of records. See, e.g., *Huber*, 404 F.3d at 1053 (defendant's bookkeeper surrendered records establishing "the allocation of expenses and income" involved in the conspiracy); *United States* v. *Ables*, 167 F.3d 1021, 1025 (6th Cir.) (records of illegal bingo operation), cert. denied, 527 U.S. 1027 (1999); see

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[11] The reported figures address cases in which money laundering was the "lead" or "most serious" offense charged. In 2001, all government agencies combined made a total of 1,437 referrals to U.S. Attorneys for prosecution under Section 1956 or other money laundering statutes. Such referrals represented 1.2% of the total referrals received by U.S. Attorneys for all offenses. *Money Laundering Offenders 1994-2001*, at 2-3, 4 (Table 1).

also *United States* v. *Turner*, 400 F.3d 491, 498 (7th Cir. 2005) ("voluminous" bank records); *United States* v. *Griffin*, 84 F.3d 912, 927 (7th Cir.) (records of cocaine distribution business), cert. denied, 519 U.S. 999, 1020 (1996); *United States* v. *Tibolt*, 72 F.3d 965, 968 (1st Cir. 1995) (records of drug business), cert. denied, 518 U.S. 1020 (1996); *United States* v. *Restrepo*, 936 F.2d 661, 664 (2d Cir. 1991) (records of drug ring).

The government cites two cases as illustrating the failure of criminals to keep adequate records. Br. 28. Neither, however, has even anecdotal value. In *Stinnett* v. *Iron Works Gym/Executive Health Spa, Inc.*, 301 F.3d 610 (7th Cir. 2002), a Title VII sexual harassment case, the Seventh Circuit affirmed summary judgment for the defendant, an alleged "prostitution spa," because there was insufficient evidence that the business met the statutory threshold of 15 employees. The court merely noted that the spa's employment records were "sketchy." *Id.* at 612. This was a remark about the record in a particular case that could have applied just as easily to a legitimate business. No money laundering was involved, and the court did not discuss any evidentiary difficulties specific to illegal enterprises.

The government's other cited case, *United States* v. *Smith*, 31 F.3d 1294 (4th Cir. 1994), cert. denied, 513 U.S. 1181 (1995), is similarly unpersuasive. The court upheld the admissibility of wiretap evidence in a drug trafficking case, relying in part on the assertion in an officer's affidavit that the wiretap was necessary because drug traffickers' records are often abbreviated or code-based. 31 F.3d at 1299. Again, the case did not involve money laundering and did not address the sweeping assertions now made by the government about the availability of records gener-

ally. Indeed, if *Smith* is relevant at all, it suggests that wiretap evidence may fill evidentiary gaps in money laundering cases just as it does in drug cases. Congress expressly anticipated as much. The Senate Report that accompanied Section 1956 points out that wiretap evidence may play an important role in money laundering prosecutions: "[T]he bill makes the new money laundering offense in 18 U.S.C. § 1956 a predicate offense for other Federal offenses and, quite importantly, the authority for a wiretap, which will be useful for law enforcement agencies in detecting and prosecuting this new offense." S. Rep. No. 99-433, at 22.[12]

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[12] The government also cites a footnote in *Grasso*, which remarks that "criminals rarely keep records." Br. 33 (citing 381 F.3d at 169 n.13). The court, however, disclaimed that remark as a basis for its decision. *Id.* In addition, the government cites *United States* v. *McHan*, 101 F.3d 1027, 1042 (4th Cir. 1996), cert. denied, 520 U.S. 1281 (1997), which notes that a "profits" standard would "create perverse incentives for criminals to employ complicated accounting measures to shelter the profits of their illegal enterprises." Br. 28. As discussed above, however, money launderers already have ample incentives to cover their tracks, whatever the evidentiary standard. Furthermore, *McHan* involved a forfeiture provision, 21 U.S.C. § 853(a)(1), which *by its terms* made clear that more than profits were covered. See 101 F.3d at 1041. The court also pointed out that Congress had specifically instructed courts "to construe the statute liberally to effectuate its remedial purpose." *Id.* at 1041 (citing 21 U.S.C. § 853(o)). No such instruction applies here. Finally, the court held in the alternative that gross receipts were forfeitable under 21 U.S.C. § 853(a)(2), which covered all "property used, or intended to be used," to facilitate certain offenses. *Id.* at 1042-43.

2. The Government Overstates The Accounting Problems In Money Laundering Cases And Overlooks Sentencing And Forfeiture Cases In Which Profits Are Routinely Established

The government argues further that a "profits" interpretation imposes an unworkable burden because "there are no generally accepted accounting principles for criminal enterprises," and courts will be required to develop from scratch "an accounting theory for illegal businesses." Br. 29. The government then hypothesizes a "host of difficult and novel questions" involved in determining a criminal enterprise's profits, including questions about "the relevant accounting period"; the method for matching income and expenses ("cash," "accrual," or "some combination of the two"); and the applicability of GAAP or other accounting principles. Br. 29-32.

Such variables, however, are unavoidable in accounting systems generally, and they arise with respect to both legitimate and illegitimate enterprises. The government concedes that "there is no one, uniform set of accounting principles that applies in all contexts, even for lawful businesses." Br. 33. As a practical matter, the government has broad control over the choice of accounting variables when it drafts indictments or complaints. It can choose the relevant transactions and time period and can aggregate or segregate transactions as long as they constitute one of the many instances of "unlawful activity" listed in Section 1956(c)(7). Cf. *United States* v. *Miller*, 22 F.3d 1075, 1077 (11th Cir. 1994) (in illegal gambling cases, the government can allege that a particular defendant performed "any necessary function in the gambling operation, other than that of a mere bettor").

The government also can choose any reasonable accounting method as the basis for its proof. This Court has stated: "Accountants long have recognized that 'generally accepted accounting principles' are far from being a canonical set of rules that will ensure identical accounting treatment of identical transactions." *Thor Power Tool Co.* v. *Comm'r*, 439 U.S. 522, 544 (1979). Thus, corporate transactions are subject to any "reasonable" accounting treatment chosen by management. The same principles apply to the government. See, e.g., 26 U.S.C. § 446 (granting Internal Revenue Service broad discretion in choosing an appropriate accounting method to reconstruct income in tax evasion cases, where taxpayer has failed to adopt a particular method); see generally R. Anthony, D. Hawkins, K. Merchant, ACCOUNTING: TEXT & CASES 9 (12th ed. 2007) ("accounting principles do not prescribe exactly how each event occurring in an organization should be recorded").

In addition, the government need not calculate profits with precision; it need only show that *some* profits were involved. Cf. *United States Dep't of Housing & Urban Development* v. *Cost Control Marketing & Sales Management of Va., Inc.*, 64 F.3d 920, 925 (4th Cir. 1995) (government need only prove a "reasonable approximation" of profits resulting from violation of federal real estate disclosure law),), cert. denied, 517 U.S. 1187 (1996); *United States* v. *Beard*, 222 F.2d 84, 89 (4th Cir.) ("It has been recognized in gambling cases and in other cases of tax evasion that it is impossible for the Government to prove the exact amounts of unreported income, and that to require precision in computing the profits from an elaborately concealed business would be tantamount to holding that skillful concealment is an immovable barrier to

proof") (citing *United States* v. *Johnson*, 319 U.S. 503, 517-18 (1943)), cert. denied, 350 U.S. 846 (1955)).

Although more precise calculations may be necessary in sentencing and forfeiture proceedings, there the government typically carries a lighter burden of proof under the preponderance standard. The government *routinely* proves criminals' profits in such proceedings, thus demonstrating that courts are fully capable of identifying and applying the necessary accounting principles (which are unaffected by the burden of proof).

For example, courts calculate profits to determine sentences for bribery and public extortion offenses. See Guidelines § 2C1.1 cmt. n.3 (where "[a] $150,000 contract on which $20,000 profit was made was awarded in return for a bribe; the value of the benefit received is $20,000."); *United States* v. *Quinn*, 359 F.3d 666, 679-80 (4th Cir. 2004) (reversal required where district court calculated gross value of contract rather than net value); *United States* v. *Sapoznik*, 161 F.3d 1117, 1119 (7th Cir. 1998) (government must prove amount that bribes contributed to gambling operation's profits, not gross receipts); see also *United States* v. *DeVegter*, 439 F.3d 1299, 1303-04 (11th Cir. 2006) (calculating profits under Guidelines § 2B4, which cross-references § 2C1 and covers bank loan and other commercial bribery); *United States* v. *Landers*, 68 F.3d 882, 885 (5th Cir. 1995) (same); see also *United States* v. *Glick*, 142 F.3d 520, 525-26 (2d Cir. 1998) (net profits required under Guidelines § 2E5, which cross-references § 2C1.1 and covers pension fund bribery); but see *United States* v. *Pena*, 268 F.3d 215, 219 (3d Cir. 2001) (gross revenue is appropriate measure of net benefit), cert. denied, 536 U.S. 960 (2002).

Likewise, courts calculate profits to determine upward departures for fraud sentences. See, e.g., *United States* v. *Kimball*, 291 F.3d 726, 734-35 (11th Cir. 2002) (per curiam) (measuring defendant's net gain as basis for departure); *United States* v. *Andersen*, 45 F.3d 217, 222-23 (7th Cir. 1995) (profits were appropriate measure for calculating departure).

In the Seventh Circuit, courts also calculate profits under RICO's criminal forfeiture provision, 18 U.S.C. § 1963(a)(3). See, e.g., *United States* v. *Arthur*, 2006 WL 2992865, at *7 (E.D. Wis. Oct. 18, 2006); *United States* v. *Dote*, 150 F. Supp. 2d 935, 943 (N.D. Ill. 2001); see generally *United States* v. *Genova*, 333 F.3d 750, 761 (7th Cir. 2003); *United States* v. *Masters*, 924 F.2d 1362, 1369-70 (7th Cir.), cert. denied, 500 U.S. 919 and 502 U.S. 823 (1991).

In sum, there is ample precedent for the calculation of profits in the criminal justice system. The government's professed concerns about the difficulty of proving profits in the money laundering context remain unsupported.

D. The Government's Position Improperly Conflates The Predicate Offense—Here, Illegal Gambling—With Money Laundering And Automatically Ratchets Up Sentences Enormously, Without The Slightest Proof That Congress Intended Such Draconian Results

In a wide range of cases, the government's "gross receipts" interpretation improperly merges money laundering with the underlying offense. That in turn leads automatically to an enormous and unwarranted increase in available prison sentences—in illegal gambling cases, from 5 years to 20 years. 18 U.S.C. §§ 1955(a), 1956(a)(1). A "profits" interpretation, on the other hand, reliably implements the necessary

distinction between money laundering and the underlying offense and thus avoids the radical inflation of prison sentences.

The purpose of the money laundering statute is not to "afford an alternative means of punishing the prior specified unlawful activity." *Johnson*, 971 F.2d at 569 (quoting *United States* v. *Edgmon*, 952 F.2d 1206, 1214 (10th Cir. 1991), cert. denied, 500 U.S. 1223 (1992). The government concedes that Section 1956 requires "a separation between the conduct that constitutes the predicate crime and the conduct that constitutes money laundering." Br. 36. Moreover, the government does not dispute that a "profits" standard reliably achieves that separation. It argues, however, that other means can achieve the same result under the "gross receipts" standard.

Two problems undermine the government's position. First, the government's preferred method of avoiding the "merger" problem often yields indeterminate results and makes no economic sense. Second, with respect to gambling cases in particular, the government fails to offer any justification for the enormous increase in prison sentences that its position entails.

1. The government's approach to the merger problem is to shift attention from the "proceeds" requirement to another statutory element—the requirement of a "distinct transaction." Br. 36-42. Even the government's own hypotheticals, however, show that this approach fails to provide a consistent solution for the merger problem. The government argues, for example, that there are no "proceeds" from a bank robbery "until the bank has been robbed"; thereafter, when the robber uses the loot "to pay his accomplices, the payments are distinct from the conduct constituting the robbery." Br. 37. But suppose that, by advance

agreement, the robber keeps the contents of the vault while the accomplices pay themselves by keeping whatever they find at the cashiers' windows. Under the government's approach, a subsequent payment is money laundering but the contemporaneous payment is not; it is bank robbery, the predicate offense. The government's distinction makes no sense because the economic results are identical.

An analogous question arose in *Scialabba*: whether a slot machine or other gambling mechanism that collects bets and makes payouts to winners *automatically*, without the intervention of human hands, is simultaneously a gambling and a laundering device. The government's position now is that all payouts to winners (and payments to employees) are separate transactions that constitute "promotion" laundering offenses, regardless of how the payments are effected. See Br. 40-42. But during oral argument in *Scialabba*, the government recognized the absurdity of that position in mechanized gambling cases and sensibly admitted that mechanical payouts to winners do *not* involve "proceeds" under the money laundering statute. *Scialabba*, 282 F.3d at 477. That admission, of course, cannot be limited to mechanical payouts. The same holds true for payouts (and all other expense payments) made by human hands.

Yet another illustration of the confusion inherent in the government's position appears in *Huber*, which ostensibly supports the government's position but in fact undercuts it. See Br. 7-8. In *Huber*, a farmer fraudulently obtained government farm subsidies and crop-insurance payments by purporting to lease parts of his farm to co-conspirators. 404 F.3d at 1051-52. The Eighth Circuit announced its acceptance of the "gross receipts" interpretation, at least in the forfeiture context. *Id.* at 1058-59 ("even if the expenses

were legitimately incurred by Huber, they would not reduce the amount subject to forfeiture" under 18 U.S.C. § 982(a)(1)) (citing *Grasso*) (emphasis omitted). Thus, the court upheld the forfeiture of gross receipts of *legitimate* crop sales funneled through the bank accounts of Huber's stand-ins, without a reduction for legitimate crop-production costs. *Id.* at 1058 (noting that the government sought forfeiture of such receipts on a "commingling" theory). The court then turned to amounts fraudulently obtained from government-subsidized crop insurance programs. Here the court decided to limit any forfeiture to the *net* amounts obtained by the stand-ins; it excluded certain insurance premiums (i.e., expenses) owed by the stand-ins that the insurer withheld from the payouts. The court ruled that the withheld amounts "were never received by" the stand-ins and thus "were not part of the corpus of the money-laundering conspiracy." *Id.* at 1059, 1060. The court evidently failed to notice that whether an expense payment occurs before, during, or after a particular transaction makes no economic difference.

Similar examples could be multiplied indefinitely. They show that reliance on the "distinct transaction" requirement fails to eliminate the merger problem inherent in the government's interpretation of "proceeds." The government's approach also causes confusion by ensnaring the courts in metaphysical questions concerning which aspects of an ongoing enterprise are transactionally distinguishable from others. The "profits" test avoids such metaphysical questions and distinguishes transactions by practical reference to the nature of the funds involved. It looks at economic reality rather than metaphysics. Determining whether a transaction involved "profits" may at times involve its own difficulties of proof (as do many other

legal tests), but the question itself is simple and concrete.

2. The government's approach not only fails to solve the merger problem consistently. It *creates* the problem consistently—by ensuring that every instance of illegal gambling also constitutes an instance of money laundering. On the government's view, money laundering occurs whenever a gambling business pays winners or employees. Virtually any activity that qualifies under the illegal gambling statute, 18 U.S.C. § 1955, will meet the government's test. Consequently, the available prison sentence jumps automatically from 5 years for illegal gambling to 20 years for money laundering, a fourfold increase. 18 U.S.C. §§ 1955(a), 1956(a)(1).

Such results are unjustifiable as a matter of statutory language, legislative intent, public policy, and simple fairness. Courts recognize that the money laundering statute is particularly susceptible to unfair use as a tool for ratcheting up sentences far beyond those specified for the underlying crime. See, e.g., *United States v. Montague*, 29 F.3d 317, 318 (7th Cir. 1994) ("an aggressive United States Attorney can use the money laundering statute" to extract "more draconian sentences" than the underlying crime entails); see also *United States v. Conley*, 37 F.3d 970, 979 (3d Cir. 1994) ("Congress did not enact money laundering statutes simply to add to the penalties for various crimes in which defendants make money").

The government has failed to cite any evidence that Congress intended to give prosecutors a fourfold increase in the sentences they can seek in every illegal gambling case. The absurdity of that result militates against the government's "gross receipts" interpretation and supports a "profit" interpretation, which avoids the problem consistently. This Court

has expressed its "reluctance to increase or multiply punishments absent a clear and definite legislative directive." *Busic* v. *United States*, 446 U.S. 398, 406-07 (1980) (quoting *Simpson* v. *United States*, 435 U.S. 6, 15-16 (1978)); see also *Chapman* v. *United States*, 500 U.S. 453, 476-77 (1991) (Stevens, J., dissenting) ("There is nothing in our jurisprudence that compels us to interpret an ambiguous statute to reach such an absurd result. In fact, we have specifically declined to do so in the past, even when the statute was not ambiguous, on the ground that Congress could not have intended such an outcome.")

Furthermore, this Court will not endorse an overbroad interpretation of a criminal statute in reliance on its narrower application through prosecutorial fairness or discretion. See *Baggett* v. *Bullitt*, 377 U.S. 360, 373-74 (1964) ("It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful . . . prosecution for some of the activities seemingly embraced within the sweeping statutory definitions"); see also *Keyishian* v. *Board of Regents*, 385 U.S. 589, 599 (1967) ("It is no answer to say that the statute would not be applied in such a case"); see also *United States* v. *Wells*, 519 U.S. 482, 512 n.15 (1997) (Stevens, J., dissenting) ("It is well settled that courts will not rely on 'prosecutorial discretion' to ensure that a statute does not ensnare those beyond its proper confines").

E. When All Considerations Are Taken Into Account, The Government's "Gross Receipts" Interpretation Remains Uncertain, And Thus The Rule Of Lenity Requires A Narrower "Profits" Interpretation

All of the preceding considerations lead to one conclusion: the money laundering statute's applica-

bility to "gross receipts" is at best ambiguous, and therefore a narrower "profits" interpretation is required by the rule of lenity. The rule of lenity holds that "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *United States* v. *Bass*, 404 U.S. 336, 348 (1971); see also *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000). "[B]efore a man can be punished as a criminal under the Federal law his case must be plainly and unmistakably within the provisions of some statute." *United States* v. *Gradwell*, 243 U.S. 476, 485 (1917); see also *McNally*, 483 U.S. at 359-60; *Heflin* v. *United States*, 358 U.S. 415, 419 (1959) ("we resolve an ambiguity in favor of lenity when required to determine the intent of Congress in punishing multiple aspects of the same criminal act").

The government notes that the rule "'comes into operation' only 'at the end of the process of construing what Congress has expressed.'" Br. 42 (quoting *Callanan* v. *United States*, 364 U.S. 587, 596 (1961)). There is no disagreement on that point. There is also no disagreement that the rule of lenity operates only when a substantial doubt remains after all other applicable canons of construction have been exhausted. When such a doubt remains, however, this Court has not hesitated to apply the rule in recognition of the fundamental values it protects:

> [The rule] is founded on two policies that have long been part of our tradition. First, a "fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." Second, because of the seriousness of criminal penalties, and because criminal punishment usually

> represents the moral condemnation of the community, legislatures and not courts should define criminal activity.

Bass, 404 U.S. at 348 (citations and footnote omitted).

The rule of lenity applies when "a reasonable doubt persists about a statute's intended scope." *Moskal*, 498 U.S. at 108; see also *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 231 (1952) (the rule applies when the statute "cannot be said to be decisively clear on its face one way or the other"). "[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct," this Court will "apply the rule of lenity and resolve the ambiguity in [the defendant's] favor." *Granderson*, 511 U.S. at 54.

The government's "gross receipts" interpretation of Section 1956 falls short of being "unambiguously correct." The rule of lenity therefore requires application of the narrower "profits" interpretation.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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No. 06-1005

In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EFRAIN SANTOS and BENEDICTO DIAZ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT EFRAIN SANTOS

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QUESTION PRESENTED

Whether the undefined term "proceeds" in the federal money laundering statute, 18 U.S.C. § 1956(a)(1), which has two common meanings in the context of financial transactions, should be construed to mean "profits" where (a) the consequence of the Government's "gross receipts" construction makes every violation of the illegal gambling business statute, 18 U.S.C. § 1955, also a money laundering violation under § 1956(a)(1)(A)(i); and (b) the legislative history and rule of lenity both compel a "profits" definition.

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STATUTORY PROVISIONS INVOLVED

1. Under the money laundering statute, 18 U.S.C. § 1956, proscribed activity known as "promotion" money laundering occurs where a person:

> knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity –
>
> > (A)(i) with the intent to promote the carrying on of specified unlawful activity;
> > . . . .

18 U.S.C. § 1956(a)(1).

Section 1956 defines the term "specified unlawful activity" as "any act or activity constituting an offense listed in [18 U.S.C. § 1961(1)]." 18 U.S.C. § 1956(c)(7)(A). The offenses listed in 18 U.S.C. § 1961(1) include operation of an illegal gambling business in violation of 18 U.S.C. § 1955.

Section 1956 does not define the term "proceeds."

2. 18 U.S.C. § 1955 makes it a crime to "conduct[], finance[], manage[], supervise[], direct[], or own[] all or part of an illegal gambling business." 18 U.S.C. § 1955(a). For purposes of § 1955, an "illegal gambling business" means:

> [A] gambling business which –
>
> > (i) is a violation of the law of a State or political subdivision in which it is conducted;

> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

18 U.S.C. § 1955(b)(1).

3. As pertinent to the § 1955 convictions in this case, the state law proscribing a gambling business is Indiana Code § 35-45-5-3, which provides in pertinent part:

> A person who knowingly or intentionally:
>
> * * *
>
> (4) conducts lotteries or policy or number games or sells chances therein; [or]
>
> * * *
>
> (6) accepts, or offers to accept, for profit, money, or other property risked in gambling; commits professional gambling, a Class D felony.

IND. CODE § 35-45-5-3(a). The following statutory definitions govern this state law offense:

> "Gain" means direct realization of winnings.
>
> "Gambling" means risking money or other property for gain, contingent in whole or in part upon lot,

> chance, or the operation of an illegal gambling device
>
> . . . .
>
> * * *
>
> "Profit" means a realized or unrealized benefit (other than a gain) and includes benefits from proprietorship or management and unequal advantage in a series of transactions.

IND. CODE § 35-45-5-1.

STATEMENT

1. Respondent Efrain Santos was charged with conducting a type of lottery known as a "bolita." Gamblers (bettors) placed bets with "runners"; the runners would take commissions of 15-20% from the bet money and deliver the betting slips and the balance of the money to "collectors." After taking a "salary" out of the bet money, the collectors would deliver the betting slips and remaining bet money to Santos. Santos paid the bolita's winners. Pet. App. 2a, 19a.

Based on these transactions, Santos was convicted under 18 U.S.C. § 1955 of conducting an illegal gambling business violative of Indiana law, and of conspiring to conduct an illegal gambling business in violation of 18 U.S.C. § 371.

Based upon the same "runner" commissions, "collector" salaries, and payments to winners, Santos also was convicted of money laundering and conspiracy to commit money laundering under the "promotion" prong of the federal money laundering statute, 18 U.S.C § 1956(a)(1)(A)(i). Santos was not charged with "conceal[ing] or disguis[ing] the nature, the location, the source, the ownership, or the control of the proceeds of" the illegal gambling business in violation of the concealment

prong of the money laundering statute, 18 U.S.C. § 1956(a)(1)(B)(i).

Santos was sentenced to concurrent prison terms of 60 months for the illegal gambling business convictions and 210 months for the money laundering convictions. Pet. App. 18a, 20a.

2. On direct appeal, Santos presented a single issue for review: Whether "the evidence was insufficient to convict him of money laundering because his cash payments to the bolita's collectors and winners were essential transactions of the illegal gambling business, and thus cannot also constitute transactions under the promotion provision of the money laundering statute, 18 U.S.C. § 1956(a)(1)(A)(i)." *United States v. Febus*, 218 F.3d 784, 789 (7th Cir.), *cert. denied*, 531 U.S. 1021 (2000). The Seventh Circuit upheld Santos's money laundering convictions, based on circuit precedent that "[a] transaction satisfies the promotion provision of the money laundering statute if it constitutes 'the practice of plowing back proceeds of [the illegal activity] to promote that activity.'" *Id.* (quoting *United States v. Jackson*, 935 F.2d 832, 842 (7th Cir. 1991)). The *Febus* panel reasoned that the collectors' commissions "compensated them for collecting the [bolita's] increased revenue and transferring those funds back to [Santos]," and that paying winning bettors "promoted the bolita's continued prosperity by maintaining and increasing the players' patronage." *Id.* at 790. This Court denied Santos' petition for a writ of certiorari.

3. On November 30, 2001, Santos timely filed his *pro se* request for relief pursuant to 28 U.S.C. § 2255. On February 28, 2002, before the Government had responded to Santos' § 2255 motion, the Seventh Circuit decided *United States v. Scialabba*, 282 F.3d 475 (7th Cir.) (Easterbrook, J.), *cert. denied*, 537 U.S. 1071 (2002), which addressed the meaning of the term "proceeds" in § 1956(a)(1) as it relates to business-like criminal

activity. The defendants in *Scialabba* were convicted of promotion money laundering under § 1956(a)(1)(A)(i) based on transactions involved in operating an illegal gambling business. *Id.* at 475-76. There, the defendants provided video poker machines to various establishments. *Id.* The defendants would split the money from the video machines with the owners of the establishments. *Id.* at 476. The splits were intended, *inter alia*, to reimburse the owners for payments the owners made to winning gamblers. *Id.*

In vacating the money laundering convictions, the *Scialabba* panel rejected the Government's argument that "proceeds" means gross income or gross receipts. *Id.* at 477. The court observed that the statute does not contain a definition supporting this broad interpretation of "proceeds," and a common understanding of that term leads to the narrower "net income" interpretation. *Id.* Had Congress intended otherwise, "[i]t would have been easy enough to write 'receipts' in lieu of 'proceeds' in § 1956(a)(1)," and "the Rule of Lenity counsels against transmuting the latter into the former." *Id.*

The *Scialabba* court further reasoned that construing the term "proceeds" to mean gross receipts would result in situations where the specified unlawful activity automatically violates the money laundering statute. *Id.* By interpreting "proceeds" to mean profits, the court ensured that the gambling statute and the money laundering statute applied to separate and distinct "steps in a criminal enterprise." *Id.* The court held that "at least when the crime entails voluntary, business-like operations, 'proceeds' must be net income; otherwise, the predicate crime merges into money laundering (for no business can be carried on without expenses) and the word 'proceeds' loses operational significance." *Id.* at 475.

4. The Government brought the *Scialabba* decision to the district court's attention before filing its response to Santos'

§ 2255 motion. With the court's approval, the parties agreed that Santos' § 2255 motion would include the question of whether *Scialabba* required his convictions for money laundering be set aside and that he be re-sentenced. Pet. App. 25a & n.5. The court, noting that the facts of *Scialabba* were "amazingly similar" to those of Santos's case (as did the Government), *id.* at 39a, found that Santos's money laundering convictions must be vacated under the holding of *Scialabba*. *Id.* at 48a-49a.

The Seventh Circuit, on the Government's appeal, upheld the district court's decision. *United States v. Santos*, 461 F.3d 886 (7th Cir. 2006); Pet. App. 1a-16a. The court said "[t]he transactions in the present case – compensating the bolita's collectors and paying its winners – are conceptually indistinguishable from the transactions in *Scialabba* which were held to be insufficient under § 1956(a)(1)(A)(i)." Pet. App. 8a. Specifically, these "payments of the bolita's operating expenses came out of its gross income." *Id.* at 8a-9a. The Seventh Circuit also affirmed that *Scialabba* did not decide any issue concerning the concealment prong of the money laundering statute, 18 U.S.C. § 1956(a)(1)(B). *Id.* at 12a-13a.

SUMMARY OF ARGUMENT

A. The Government presents a seemingly simple question: "whether 'proceeds' means the gross receipts from the unlawful activities or only the profits, *i.e.*, the gross receipts less expenses." Gov't Br. (I). The issue is not so simple, however, because of the practical consequences of the Government's gross receipts construction. Combined with the Government's broad application of the "promotion" prong of the money laundering statute, the gross receipts construction makes every violation of the illegal gambling business statute an automatic violation of the money laundering statute. This is not merely some hypothetical possibility, as shown by the facts of this case.

Santos' only supposed "transactions in proceeds" were transactions necessary to the operation of every illegal gambling business. Both this Court's precedent and the applicable principles of statutory construction counsel against construing criminal statutes tc create multiple offenses and multiple punishments for the same conduct.

B. Furthermore, the term "proceeds" is ambiguous as between gross and net. For every dictionary definition the Government cites supporting a gross receipts interpretation, there is at least one of equal prominence supporting the interpretation of proceeds as meaning profits. This Court's precedent employs two methods for resolving ambiguity in the ambit of criminal statutes. Both methods lead directly to the profits definition of proceeds in the money laundering statute.

First, the legislative history of the money laundering statute demonstrates that Congress was concerned about profits of criminal activity, which supports a profits construction of proceeds. This on-point legislative material cannot be superseded by the legislative history of another statute relied on by the Government – especially where the other history is itself ambiguous.

The second method used to resolve ambiguity in criminal statutes, when other means of construction do not clearly answer the question, is the rule of lenity. This rule, which is grounded in due process and the respective constitutional roles of the legislative and judicial branches of government, also squarely supports choosing the profits construction of proceeds. In contrast, the Government's claim about the burden of proving profits, which is overblown and speculative in any event, is not grounded in any principle governing judicial construction of criminal statutes – but rather constitutes a plea for legislative amendment properly directed to Congress.

C. The judgment below should also be affirmed because the money laundering statute requires "a financial transaction which in fact involves the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(1). As the Government acknowledges, Congress intended that this be a monetary transaction separate from and in addition to the predicate crime. Here, there was no financial transaction in proceeds that was separate from and in addition to the underlying crime of operating an illegal gambling business. Rather, the only financial transactions the Government proved – (1) the collection and delivery to Santos of bet money and betting slips, with the "runners" and "collectors" deducting their compensation from bet money before passing on the balance; and (2) the payment of winnings to winning bettors – are transactions constituting the operation of an illegal gambling business under 18 U.S.C. § 1955(a). Contrary to the Government's argument, these transactions are a necessary part of conducting an illegal gambling business in violation of Federal law and the underlying Indiana state law. Section 1956(a)(1), on the other hand, requires a transaction in the proceeds of specified unlawful activity *other than* the mere consummation of the specified unlawful activity itself.

ARGUMENT

I. Construing "Proceeds" As "Profits" Supports The Purpose Of The Money Laundering Statute And Avoids Making Every Illegal Gambling Business Also A Money Laundering Crime.

A. Under The Government's Construction Of "Proceeds" As "Gross Receipts," Every Person Convicted Of Illegal Gambling Under 18 U.S.C. § 1955 Would Also Be Guilty Of Money Laundering Under 18 U.S.C. § 1956(a)(1)(A)(i).

1. Under the Government's construction of "proceeds" as meaning "gross receipts," any person guilty of conducting an illegal gambling business in violation of 18 U.S.C. § 1955 would be automatically guilty of promotion money laundering under 18 U.S.C. § 1956(a)(1)(A)(i). The reason for this is the Government's position, adopted by the court in Santos' direct appeal, that simply paying bet collectors and winning bettors "promotes" gambling under the money laundering statute. *United States v. Febus*, 218 F.3d 784, 789-90 (7th Cir.), *cert. denied*, 531 U.S. 784 (2000). *Every* prosecution for operating an illegal gambling business will involve a gambling business that paid its collectors and winning bettors. Accordingly, construing "proceeds" in the money laundering statute to mean net proceeds is necessary to keep the two crimes separate. *United States v. Scialabba*, 282 F.3d 475, 475-77 (7th Cir.), *cert. denied*, 537 U.S. 1071 (2002).

Scialabba also involved running an illegal gambling business in violation of § 1955 as the predicate crime, and was decided after that court had accepted the Government's position that paying collectors and winners constitutes promotion of

illegal gambling under the money laundering statute. Judge Easterbrook reasoned in *Scialabba* that:

> If . . . the word "proceeds" is synonymous with gross income, then we would have to decide whether, as a matter of statutory construction (distinct from double jeopardy), it is appropriate to convict a person of multiple offenses when the transactions that violate one statute necessarily violate another. *See, e.g., Heflin v. United States*, 358 U.S. 415 (1959); *Simpson v. United States*, 435 U.S. 6 (1978); *Busic v. United States*, 446 U.S. 398 (1980). By reading § 1956(a)(1) to cover only transactions involving profits, we curtail the overlap and *ensure that the statutes may be applied independently to sequential steps in a criminal enterprise.*

Id. at 477 (emphasis added).

In *United States v. Malone*, 484 F.3d 916, 921 (7th Cir. 2007), the Seventh Circuit further discussed the relationship between (1) its holding in *Scialabba* that "proceeds" means net proceeds (or profits) and (2) its holding in *Febus* that activities which are part of the underlying crime can also "promote" the carrying on of that crime:

> We have previously held that the promotion element can be met by "transactions that promote the continued prosperity of the underlying offense," i.e., *that at least some activities that are part and parcel of the underlying offense can be considered to promote the carrying on of the unlawful activity. Febus*, 218 F.3d at 790. But whether these activities can be considered transactions in the proceeds of the unlawful activity is a separate question. In *United States v. Scialabba*, 282 F.3d 475, 476-78 (7th Cir. 2002), we recognized the absence of any clear

> definition of "proceeds" in the money laundering statute in holding that defendants who operated illegal video poker machines in taverns and other establishments were not guilty of money laundering for making winner payouts and compensatory payments to the tavern owners who helped facilitate the operation. We explained that, unlike the act of reinvesting a criminal operation's net income to promote the carrying on of the operation, the act of paying a criminal operation's expenses out of gross income is not punishable as a transaction in proceeds under § 1956(a)(1)(A)(i). *Id.* at 476; *see also Santos v. United States*, 461 F.3d 886, 893 (7th Cir. 2006) (declining to overrule *Scialabba* in the face of conflicting holdings in other circuits). In doing so, we relied on *the rule of lenity* (which instructs that statutory ambiguities should be resolved in favor of the defendant) and a desire to *avoid convicting a defendant of multiple crimes "when the transactions that violate one statute necessarily violate another."* 282 F.3d at 477.

Id. (emphasis added) (Evans, J., joined by Easterbrook and Posner, JJ.).[1]

2. The Government contests this point only by arguing about the essential elements of the two crimes. *See* Gov't Br. 41-42. As discussed later, that argument misstates the pertinent

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[1] The Government argued below that *Scialabba* conflicted with *Febus*, *see* Pet. App. 22a, and that *Scialabba* was not "a proper interpretation of the *promotion prong* of the money laundering statute." Gov't Resp. Br. to Santos § 2255 Motion at 29 (emphasis added). As this argument recognized, the meaning of "proceeds" cannot be decided in isolation from the "promotion" context of the money laundering statute and the *Febus* opinion on the scope of "a financial transaction which in fact involves the proceeds of specified unlawful activity . . . with the intent to promote." *Id.*

Indiana gambling statutes. *See* Part III, *infra*. The point here, however, is simpler. Operating an illegal gambling business under 18 U.S.C. § 1955 requires not only a gambling business that is illegal under state law but also a business that "involves five or more persons" and "has been or remains in substantially continuous operations of a period in excess of thirty days or has a gross revenue of $2,000 in any single day." 18 U.S.C. § 1955(b)(1). As a practical matter, there will never be an illegal gambling business that does not pay its bet collectors and winning bettors. The Government does not suggest otherwise, notwithstanding its argument concerning the technical elements of the respective crimes.[2]

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[2] This point is brought into even sharper relief by another opinion adopting the Government's construction that paying winning bettors constitutes "promotion" under the money laundering statute, reasoning that "nothing makes an illegal gambling operation flourish more than the prompt payment of winners[.]" *United States v. Iacaboni*, 363 F.3d 1, 5 (1st Cir. 2004) (citations omitted). This amounts to saying a person promotes a business by running a business. Hence, conducting a gambling business in violation of § 1955 collapses into promotion money laundering under § 1956(a)(1)(A)(i) if proceeds means gross receipts. The further discussion in *Iacaboni*, which also adopts the Government's "gross receipts" construction, illustrates this point too. Aside from the court's discussion of concealment-type issues – which are separately addressed by § 1956(a)(1)(B)(i) – its analysis is that payments to winning bettors "reflects the decision of Congress . . . to proscribe not only certain unlawful cash-generating schemes, but also the means by with they are carried out . . . ." *Id.* at 6. In other words, Congress "proscribed not only" conducting an illegal gambling business (*i.e.*, the "unlawful cash generating scheme[]") "but also" conducting an illegal gambling business (*i.e.*, "the means by which" the unlawful cash is generated). The district court in *Iacaboni* was even more straightforward:

> [P]aying winners is obviously part and parcel of the crime of operating an illegal gambling business . . . . Under the Government's logic, *any* illegal gambling operation would also be a money laundering operation.

(Cont'd)

Consequently, every gambling business violative of § 1955 will also be promotion money laundering violative of § 1956(a)(1)(A)(i) if "proceeds" in the latter statute means gross receipts. Having adopted the Government's statutory construction that paying collectors and winners – "activities that are part and parcel of the underlying [gambling] offense," *Malone*, 484 F.3d at 921 – constitutes "promot[ion]" under the money laundering statute, the Seventh Circuit correctly concluded that "proceeds" under the latter statute must mean profits in order to "ensure that the statutes may be applied independently to sequential steps in a criminal enterprise." *Scialabba*, 282 F.3d at 477.

This point is not undermined in Santos's case by the *Febus* court's statements about "plowing back proceeds of [the illegal activity] to promote that activity"; that "Santos reinvested the bolita's proceeds to ensure its continued operation"; and this resulted in the bolita's gross revenues increasing over a 6-year period from $250,000 to $410,000 annually. 218 F.3d at 789-90. By "plowing back" and "reinvesting" proceeds, the Seventh Circuit meant only "pay[ing] the bolita's collectors and winners." *See id.* Those payments were all the Government proved, as it acknowledges here. Gov't Br. 4-5. With respect to the increase in betting revenues, the Government did not present evidence that reinvestment of profits was necessary for that to happen. Nor is such a proposition self-evident. An illegal lottery may not involve significant fixed costs, and therefore not require capital investment (through reinvesting profits or otherwise) for gross revenues to increase.

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United States v. Iacaboni, 221 F.Supp.2d 104, 113 (D. Mass. 2002) (emphasis in original), *aff'd in part and rev'd in part on other grounds*, 363 F.3d 1 (1st Cir. 2004).

B. The Applicable Legal Principles Compel Construing "Proceeds" As "Profits" To Avoid Creating Multiple Offenses For The Same Conduct.

1. The undefined term "proceeds" in § 1956 has two common meanings in the context of financial transactions: both net receipts (or profits) and gross receipts. *See* Part II(A), *infra*. It is elementary in statutory construction (as in language generally) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used. *See, e.g.*, *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991); *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) (defining a term by considering its context and noting that "[t]he definition of words in isolation, however, is not necessarily controlling in statutory construction.").

Construing "proceeds" in context requires reading that term in light of the Government's statutory gloss, adopted by the Seventh Circuit in *Febus*, that paying bet collectors and winning bettors "promote[s]" an illegal gambling business – together with its necessary consequence that, unless proceeds means profits, conducting a gambling business in violation of § 1955 automatically constitutes promotion money laundering in violation of § 1956 (a)(1)(A)(i). As held in *Simpson v. United States*, 435 U.S. 6, 15-16 (1978) – one of the cases the Seventh Circuit relied on in *Scialabba*, 282 F.3d at 477 – "absent a clear and definite legislative directive," construction of criminal statutes as duplicative is disfavored. "[T]his Court has steadfastly insisted that doubt will be resolved against turning a single transaction into multiple offenses." *Simpson*, 435 U.S. at 15 (citations omitted).

2. The "tools" the Court employs to ascertain what "Congress had in mind" in circumstances like these are the "appropriate legislative materials" and the "rule of lenity." *Busic v. United States*, 446 U.S. 398, 407 (1980) (also cited in *Scialabba*, 282 F.3d at 477).

The legislative history of the money laundering statute stands squarely against construing § 1956(a)(1)(A)(i) in a manner that makes it collapse into the illegal gambling statute. Congress "intended money laundering to be a *separate* crime *distinct* from the underlying offense that generated the proceeds," *United States v. LeBlanc*, 24 F.3d 340, 346 (1st Cir. 1994) (emphasis added) (citing S. REP. NO. 99-433, 99th Cong., 2d Sess. (1986) ("1986 Senate Report"); H.R. REP. NO. 855, 99th Cong. 2d Sess., pt.1 (1986) ("1986 House Report"))); and "to punish activity that was *not* previously punished," *United States v. Edgmon*, 952 F.2d 1206, 1213-14 (10th Cir. 1991) (emphasis added) (citing 1986 Senate Report, S. REP. NO. 99-433, at 1-9); *accord, e.g., United States v. Heaps*, 39 F.3d 479, 486 (4th Cir. 1994). This is just like *Heflin v. United States*, 358 U.S. 415 (1959) – another case relied upon in *Scialabba*, 282 F.3d at 477 – where this Court held a defendant may not be convicted under the Bank Robbery Act for both taking and feloniously receiving the same property based on the same conduct. *Hefflin*, 358 U.S. at 419-20. The Court relied on the legislative history of the Act to conclude that "Congress was trying to reach a new group of wrongdoers, not to multiply the offense of the bank robbers themselves." *Id.*

The other "tool," the rule of lenity, cuts in the same direction. The Court "resolve[s] an ambiguity in favor of lenity when required to determine the intent of Congress in punishing multiple aspects of the same criminal act." *Id.* at 419.[3]

These principles of statutory construction apply with particular force here because, under the Government's construction of the money laundering statute, the *identical conduct* Congress determined should be subject to a maximum punishment of five years imprisonment under the gambling statute becomes subject to punishment up to *four times* longer.

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[3] The rule of lenity also requires that "proceeds" – if ambiguous even when read in context – be construed as profits. *See* Part II(C), *infra*.

See Gov't Br. 9 (240 months compared to 60 months). Santos was sentenced to 210 months on the money laundering charges, which is more than triple the maximum punishment under the gambling statute, even though the Government's evidence shows he did *nothing* that was not already punished by that statute.

"Th[e] policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Simpson*, 435 U.S. at 15 (quoting *Ladner* v. *United States*, 358 U.S. 169, 178 (1958)). Here, "what Congress intended" is known, and it did *not* intend "to further penalize the underlying criminal conduct," *United States v. Stavroulakis*, 952 F.2d 686, 691 (2d Cir. 1992) (citing 1986 Senate Report, S. REP. NO. 99-433, and 1986 House Report, H.R. REP. NO. 99-855), nor "to afford an alternative means of punishing the prior 'specified unlawful activity,'" *Edgmon*, 952 F.2d at 1213-14 (citing 1986 Senate Report). *Accord, e.g.*, *United States v. Johnson*, 971 F.2d 562, 569 (10th Cir. 1992). The only thing accomplished by using the money laundering statute to multiply Santos' punishment nearly fourfold for paying collectors and winners is to "further penalize" the activity already punished under the gambling statute, which is exactly what Congress did not intend the money laundering statute to do.

3. The immediate statutory context of "proceeds" is "conduct[ing] or attempting to conduct a financial transaction which in fact involves the proceeds of specified unlawful activity . . . with the intent to promote the carrying on of specified unlawful activity . . . ." 18 U.S.C. § 1956(a)(1)(A)(ii).

Given this context, an especially informative dictionary definition of "proceeds" is: "money obtained from an event or activity: *proceeds will help purchase new equipment.*" NEW OXFORD AMERICAN DICTIONARY 1351 (2d ed. 2005) (emphasis in original). The example provided goes to the heart of promotion money laundering. Santos could not have used

the money paid as commissions to his collectors to purchase, for example, new equipment to promote his illegal gambling business. Nor could he have used the money paid to bet winners to purchase new equipment to promote his illegal gambling business. Rather, he had to use that money to pay his collectors, runners, and winners in order run an illegal gambling business. The only "proceeds" that Santos could have used to promote his gambling business by purchasing new equipment would have been profits – and the Government admittedly did not present evidence that Santos conducted any transaction involving any profits with an intent to promote the gambling business. Gov't Br. 4-5; *see also* Gov't Seventh Circuit Br. 7 ("The government presented no evidence at trial that any of the funds used by Santos to pay winners, runners, or collectors were 'net profits.'"). Thus, the Government "concedes that, if the word 'proceeds' does not mean gross receipts, it presented insufficient evidence at trial to convict Santos of money laundering." *Id.*

4. The Government says the Seventh Circuit's construction "of the scope of the promotion component" is inconsistent with the money laundering statute "as it has been traditionally understood." Gov't Br. 24. There is, however, no "traditional" understanding that conduct necessary to the crime of conducting an illegal gambling business simultaneously violates the money laundering statute. The Government cites only two cases to that effect, one of which was decided after *Scialabba* and the other of which did not present the statutory construction issue. Gov't Br. 39 (citing *United States v. Iacaboni*, 363 F.3d 1 (1st Cir. 2004), and *United States v. Conley*, 37 F.3d 970, 978 (3d Cir. 1994)); *see also Scialabba*, 282 F.3d at 478 (discussing *Conley*).

The pertinent "tradition" under the money laundering statute is the Government taking extreme positions that are repeatedly rejected by the appellate courts. These include the Government's claim that the "concealment" prong of § 1956(a)(1) is satisfied by *any* transaction using proceeds of underlying unlawful

activity, such as purchasing items for personal use.[4] The Government has similarly claimed that using proceeds to purchase personal items or to pay legitimate business expenses satisfies the promotion prong.[5] The Government also has repeatedly claimed transactions that were an integral part of the predicate crime simultaneously constituted transactions in proceeds violating the money laundering statute.[6]

Previously, the Government's most extreme position may have been in *Heaps*, where it claimed the defendant's receipt of payment for an illegal drug sale, followed by his putting the payment in a drawer, constituted a transaction in proceeds promoting that illegal sale. *Heaps*, 39 F.3d at 484-86. The Fourth Circuit rejected the Government's position because it would have made any illegal drug transaction also an automatic money laundering crime:

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[4] *See United States v. Sanders*, 928 F.2d 940, 945-46 (10th Cir. 1991) (rejecting this attempt to "turn the money laundering statute into a 'money spending statute'" and reversing money laundering convictions); *see also, e.g., United States v. Blankenship*, 382 F.3d 1110, 1130-31 (11th Cir. 2004) ("This seems to be a simple case of governmental overreaching"; reversing money laundering convictions); *United States v. Johnson*, 440 F.3d 1286, 1293 (11th Cir. 2006) (reversing money laundering convictions); *United States v. Olaniyi-Oke*, 199 F.3d 767, 770-71 (5th Cir. 1999) (same); *United States v. Dobbs*, 63 F.3d 391, 397-98 (5th Cir. 1995) (same); *United States v. Shoff*, 151 F.3d 889, 892 (8th Cir. 1998) (same); *United States v. Herron*, 97 F.3d 234, 237 (8th Cir. 1996) (same).

[5] *See, e.g., United States v. McGahee*, 257 F.3d 520, 526-27 (6th Cir. 2001) (reversing money laundering convictions); *Olaniyi-Oke*, 199 F.3d at 770 (same); *United States v. Brown*, 186 F.3d 661, 668-71 (5th Cir. 1999) (same); *see also United States v. Calderon*, 169 F.3d 718, 721 (11th Cir. 1999).

[6] *See, e.g., United States v. Christo*, 129 F.3d 578 (11th Cir. 1997) (reversing money laundering convictions); *United States v. Gaytan*, 74 F.3d 545, 555-56 (5th Cir. 1996) (same); *United States v. Dimeck*, 24 F.3d 1239 (10th Cir. 1994) (same). This category is further discussed in Part III, *infra*.

> Were the payment for drugs itself held to be a transaction that promoted the unlawful activity of that same transaction virtually *every* sale of drugs would be an automatic money laundering violation as soon as money changed hands. Understood this way, § 1956 would have such reach that it would criminalize the very same conduct already criminalized by the drug laws.

Id. at 485-86 (emphasis in original). The Government now apparently accepts *Heaps* as correctly rejecting this position. *See* Gov't Br. 37 (citing *Heaps* with apparent approval). Yet the Government tries to accomplish the same extreme result in this case, where its position would make every operation of an illegal gambling business "an automatic money laundering violation." *Heaps*, 93 F.3d at 485.

5. The Government also argues the profits construction "would logically also apply in concealment cases," and that this is inconsistent with the purpose of the concealment prong of the money laundering statute. Gov't Br. 26-27. However, the Seventh Circuit has not decided that the profits requirement applies to money laundering under the concealment prong. Pet. App. 12a-13a. Moreover, the court indicated that even under the promotion prong, the profits requirement may apply only where the underlying crime "entails voluntary, business-like transactions." *Scialabba*, 282 F.3d at 475. If, as the Seventh Circuit suggested, the meaning of "proceeds" can vary depending upon the type of underlying crime, it may also apply differently as between types of money laundering. In particular, a key problem which the profits construction solves – "convicting a defendant of multiple crimes 'when the transactions that violate one statute necessarily violate another,'" *Malone*, 484 F.3d at 921 (citation omitted) – will not arise under the concealment prong so long as some proof of concealment is required beyond the type of transactions necessarily involved in the underlying criminal activity.

If, however, the profits construction is applied to concealment cases as a matter of logic (*i.e.*, because the "proceeds" term in § 1956(a)(1) applies to both promotion and concealment prongs), that will directly result from the Government's urging a statutory construction under which "activities that are part and parcel of the underlying offense can be considered to promote the carrying on of the unlawful activity." *Id.* (citation omitted). Construing "proceeds" as profits avoids unfair and unwarranted multiple convictions based on the same conduct, contrary to the intended effect of the money laundering statute. "To construe statutes so as to avoid absurd or glaringly unjust results, foreign to legislative purpose, is . . . a traditional and appropriate function of the courts." *Sorrells v. United States*, 287 U.S. 435, 450 (1932).

II. If The Term "Proceeds" Is Ambiguous, The Legislative History And The Rule Of Lenity Compel A "Profits" Construction.

If the Court finds that statutory context does not clarify the meaning of the term "proceeds," as addressed above, the term is at the least ambiguous. Contrary to the Government's argument, "proceeds" does not have *one* common meaning in the context of financial transactions. Rather, the dictionary definitions support at least two common meanings: net receipts (or profits) and gross receipts. Neither meaning is obviously more appropriate (or "primary") than the other. Apart from construing the term in its statutory context, there are two methods for deciding which of the two common meanings of "proceeds" should be adopted: examination of the legislative history and application of the rule of lenity. Either leads to a construction of "proceeds" as "profits."

A. The Term "Proceeds" Commonly Means Either Gross Receipts Or Profits.

When a word is not defined by statute (as is the case here), this Court "normally construe[s] it in accord with its ordinary

or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). Relying on selected dictionary definitions, the Government suggests a straightforward enquiry into the "plain meaning" to define "proceeds" as "gross receipts." However, the dictionaries relied on by the Government, as well as many other dictionaries the Government ignores, prove that "proceeds" has no single common meaning in the financial transactions context.[7]

A review of various Webster's dictionaries shows that "proceeds" is commonly understood to mean *both* gross receipts *and* profits: WEBSTER'S NEW CENTURY DICTIONARY 511 (2001) (defining "proceeds" as "the total amount of money brought in; the net amount received"); WEBSTER'S UNIVERSAL COLLEGE DICTIONARY 629 (2001) (defining "proceeds" as "the total amount or profit, derived from a sale or other transaction"); WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 1072 (3d college ed. 1988) (defining "proceeds" as "the money or profit derived from a sale, business venture, etc."); RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 1542 (2d ed. 1998) (defining "proceeds" as "**b.** the total amount derived from a sale or other transaction . . . **c.** the profits or returns from a sale, investment, etc."); MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 929 (10th ed. 1995) (defining "proceeds" as: "1: the total amount brought in <the proceeds of a sale> 2: the net amount received (as for a check or from an insurance settlement) after deduction of any

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[7] The Government's own cited definitions – which rely on terms and phrases such as "results," "accrues," "derives," "received," "brought in," "obtained," "produced," "realized," and "when converted," *see* Gov't Br. 13-14 – are inherently ambiguous and therefore unhelpful in defining "proceeds" in § 1956(a)(1). If anything, these definitions support a profits construction. For example, if a house is sold for $150,000 and its seller has a $100,000 mortgage, the proceeds "received," "realized," "accrued," "obtained," etc., by the seller is $50,000, or the net amount.

discount or charges."). Synonyms for "proceeds" include "profits, earnings, gain, lucre, return." MERRIAM WEBSTER'S COLLEGIATE THESAURUS 579 (1988).[8]

In sum, the most a canvassing of dictionaries accomplishes is proving that the "proceeds" term in the money laundering statute is ambiguous. *Accord United States v. Grasso*, 381 F.3d 160, 167 (3d Cir. 2004), *vacated and remanded on other*

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[8] A Google search ("define: proceeds") returns several definitions, the first three of which are net:

> return: the income or profit arising from such transactions as the sale of land or other property; "the average return was about 5%." wordnet.princeton.edu/perl/webwn
>
> An amount received from selling a security after commissions are deducted. www.tiaa-crefbrokerage.com/invest_glosry_PrPt.htm
>
> The net amount of money payable by the insurer at the death of an insured or at the maturity of a policy. www.farmers.com/FarmComm/WebSite/html/glossary/glossaryP.jsp

Another investment-related website makes clear that "proceeds" commonly means both "net" and "gross" receipts. *See* http://www.investorwords.com/3870/proceeds.html (defining "proceeds" as "Money received through a sale or loan. The term sometimes refers to net proceeds (after any commissions, fees or other charges are deducted), and sometimes refers to gross proceeds (before such deductions)."). Other dictionary definitions support a "net" interpretation of "proceeds." *E.g.*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1398 (4th ed. 2000) (defining "proceeds" as "[t]he amount of money derived from a commercial or fundraising venture; the *yield*.") (emphasis added); THE SHORTER OXFORD ENGLISH DICTIONARY (5th ed. 2002) (defining "proceeds" as "[m]oney produced or gained by a transaction or undertaking; *profit*; an outcome, a result.") (emphasis added).

grounds, 544 U.S. 945 (2005). The most that can be said of the Government's dictionary definitions is that the "gross receipts" construction it prefers is merely one possible interpretation of an ambiguous term in a criminal statute. In this situation, both the relevant legislative history and the rule of lenity require the more lenient "profits" construction of "proceeds."

B. The Legislative History Shows Congress Was Focused On "Profits" Of Criminal Activity.

1. The legislative history of the money laundering statute reveals that Congress was focused on the use of the "profits" from criminal activity. The 1986 Senate Report explains the purpose of the money laundering act:

> The purposes of S. 2683, the Money Laundering Crimes Act of 1986, are: To create a Federal offense against money laundering; to authorize forfeiture of the *profits* earned by launderers; to encourage financial institutions to come forward with information about money launderers without fear of civil liability; to provide Federal law with additional tools to investigate money laundering; and to enhance the penalties under existing law in order to further deter the growth of money laundering.

1986 Senate Report, *supra*, S. REP. NO. 99-433, at 1 (emphasis added). *See also id.* at 2 ("The growth of money laundering has been a corollary of the spread of *profitable* illegal enterprises.") (emphasis added); *id.* at 9 (quoting Sen. Thurmond, Chairman of the Judiciary Committee, the sponsor of the money laundering bill: "Creation of a money laundering offense is imperative if our law enforcement agencies are to be effective against the organized criminal groups which reap *profits* from unlawful activity by camouflaging the proceeds through elaborate laundering schemes.") (emphasis added).

The congressional record is quite clear that Congress intended to address the practice, particularly in organized crime, of transforming illegal profits into legitimate income, which is the very essence of money laundering. Receipts cannot make that transformation until the expenses of the illicit activity have been taken care of and only if the expenses do not exceed the gross proceeds. Hence, comments during the floor debate make clear that Congress was targeting *profits* generated by illicit activity.

> Gangsters and drug traffickers have demonstrated the importance they attach to money laundering by making it so pervasive and sophisticated that it has become a threat to the reputation of America's banking system. True, launderers do resort to casinos and other vehicles to hide their illegal *profits*. But they do not hesitate to employ local banks, banks with international customers, brokerage houses, and indeed America's financial networks.
>
> * * *
>
> The crime chieftains are using a variety of techniques and a variety of locations to inject their *profits* into the American financial system.

132 CONG. REC. 2, 1983 (1986) (statement of Rep. Lungren) (emphasis added).

> The need to eliminate the *profitability* of criminal activity has become a national priority.
>
> In order to eliminate the *profitability* of criminal activity the administration and Congress have focused their attention on money laundering. Money Laundering has been defined by the President's

> Commission on Organized Crime as "the process by which one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate." Simply, it is a process by which criminals can take their illegal *profits* and give them the appearance of being earned legitimately.

Id. at 1989 (statement of Rep. Meyers) (emphasis added).

> That is the *profit* that is in the narcotics business. If we can get at the *profit*, if we can make it too expensive for the big money, organized criminals to get involved and to continue this high-level operation, we can make a very significant impact on the entire process.

Id. at 1986 (statement of Rep. McCollum) (emphasis added).

> "Money Laundering" is the term applied to the act of making funds from illegal sources appear as legitimate income. Without money laundering, the *profits* of illegal gambling, prostitution, extortion, drug trafficking, etcetera, could not be realized. Eliminating money laundering, therefore, would help to take *profit* out of the crime . . . . [A]n attack on money laundering is an attack on the *profit* of drug trafficking and other organized crimes. These criminals are *profit*-oriented, and an attack on their pocket books attacks the heart of the criminal enterprise.[9]

Id. at 1989 (statement of Rep. Fish) (emphasis added).

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[9] This statement of Representative Fish – that "criminals are profit-oriented," 132 CONG. REC. 2, 1989 (1986) – illustrates the weakness of

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> A wide variety of organized criminal groups, could not reap the *profits* of their unlawful activity without the means to camouflage their proceeds to appear as though they came from legitimate sources and business investments. This bill would severely restrict the ability of criminal groups to disguise and profit from illegal *gains*.

131 CONG. REC. 12, 16717 (1985) (statement of Sen. Thurmond) (emphasis added).

> The House of Representatives is duty bound to protect the banking system and our communities from money laundering. I believe that if we stop money laundering we would eliminate the *profit* of the underlying crimes *because the purpose of money laundering is to make illegal profits appear as legitimate income.*

Id. at 16173 (statement of Rep. McCollum) (emphasis added).

> Money Laundering is the lynchpin of organized drug trafficking schemes and hundreds of American financial institutions are wittingly and unwittingly feeding the lifeblood of drug trafficking by assisting in the laundering of billions of U.S. Dollars.
>
> * * *

(Cont'd)

the Government's argument that unprofitable criminals would escape money laundering. *See* Gov't Br. 25 (arguing that "an inept criminal who never managed to earn a profit would never be guilty of money laundering at all"). Congress did not intend the money laundering statute to target "inept" criminals – but instead the *profits* of "big money, organized crime." *See* 132 CONG. REC. 2, 1986 (1986) (statement of Rep. McCollum).

> If we are ever going to take the *profit* out of crime we must attack those *profits* directly.

131 CONG. REC. 4, 4541, 4543 (1985) (statement of Rep. McCollum) (emphasis added).

> Creation of a money laundering offense is imperative if our law enforcement agencies are to be effective against the organized criminal groups which reap *profits* from unlawful activity by camouflaging the proceeds through elaborate laundering schemes.

132 CONG. REC. 32, 17571 (1986) (statement of Sen. Thurmond) (emphasis added).

> The methods by which drug runners *conceal their illicit profits and reinvest them* in the drug trade are a vital part of the overall drug problem. The Senate recognized this reality when it voted 98-0 recently for a bill making *willful laundering of profits from criminal enterprises a federal offense.*

132 CONG. REC. 16, 22504 (1986) (statement of Sen. Trible) (commenting on the Drug Money Laundering Prevention Act of 1986) (emphasis added).

2. Incredibly, the Government does not cite the legislative history of the money laundering statute – but instead relies on the legislative history of *another* statute, the amended forfeiture provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.* *See* Gov't. Br. 16-17 (citing S. REP. NO. 225, 98th Cong., 1st Sess. 199 (1983)). If legislative history has relevance in statutory construction, the legislative history of the statute in issue has the primary, if not exclusive, relevance.

Furthermore, the legislative history of RICO's forfeiture provision does not dictate that "proceeds" even in that statute means gross receipts. The legislative history quoted by the Government suggests that "*net* profits" need not be proven. Gov't Br. 16 (quoting S. REP. NO. 225, *supra*, at 199 & n.24 ("[i]t should not be necessary for the prosecutor to prove what the defendant's *overhead expenses* were") (emphasis added)). However, the potential meanings of proceeds are not limited to "gross receipts" on the one hand and "net profits" on the other. Most obviously, "proceeds" can also mean gross profits – *i.e.*, gross receipts less only direct costs – as some courts have held under the RICO forfeiture statute, 18 U.S.C. § 1963(a)(3). *United States v. Lizza Indus.*, 775 F.2d 492, 498 (2d Cir. 1985); *United States v. Milicia*, 769 F. Supp. 877, 887-89 (E.D. Pa. 1991), *appeal dismissed*, 961 F.2d 1569 (3d Cir. 1992); *see also United States v. Riley*, 78 F.3d 367, 371 (8th Cir. 1996) (construing "proceeds" in RICO's forfeiture provision to mean "something less than the gross receipts of a defendant's . . . business . . ."). In this case, Santos prevails under either a net profits or gross profits definition of proceeds, because Government did not prove either measure.

3. The Government's reliance on other statutes (*see* Gov't Br. 17-19) also does not compel the "gross receipts" construction it urges for the money laundering statute. As the Government admits, Congress has sometimes used "proceeds," sometimes "gross proceeds," and sometimes "gross receipts." *Id.* 19 & n.2. Contrary to the Government's claim that these terms are used interchangeably, these different terms – in particular, "gross proceeds" versus "proceeds" – require different scope. This is supported by dictionary definitions of "proceeds" as both gross amounts and net amounts (or profits). The fact that Congress has sometimes used "gross proceeds" suggests only Congress' intent there to apply the broader common meaning of "proceeds." The absence in the money laundering statute of the adjective "gross" suggests that Congress did not intend to apply the broad meaning of "proceeds" in this statute.

Congress thus knew to use specific terms such as "gross receipts" and "gross proceeds" when it intended to target the gross amount received. Originally, both 18 U.S.C. § 982 and its civil forfeiture counterpart, 18 U.S.C. § 981, used the term "gross receipts" to describe forfeitable property. The original text of both statutes authorized forfeiture of "any property, real or personal, which represents the gross receipts a person obtains . . . ." Money Laundering Control Act of 1986, Pub. L. No. 99-570, tit. I, subtit. H, § 1366(a), 100 Stat. 3707-39.[10] Congress later amended both statutes and substituted the phrase "property . . . involved in [money laundering] . . . ," which was defined as the "proceeds of some form of specified unlawful activity." Anti-Drug Abuse Amendments Act of 1988, Pub. L. 100-690, § 6463, tit. VI, subtit. M, 102 Stat. 4374, 4375. Under the 1988 amendments, Congress continued to use the terms "gross receipts" and "gross proceeds" in both the civil and criminal forfeiture statutes as applied to other designated crimes. *See, e.g.*, 18 U.S.C. § 981(a)(1)(D) & (E) ("gross receipts"); 18 U.S.C. § 981(a)(1)(F) ("gross proceeds"); 18 U.S.C. § 982(a)(1),(3) & (4) ("gross receipts"); 18 U.S.C. § 982(a)(1),(5),(7) & (8)(B) ("gross proceeds").

In sum, Congress was well aware the term "proceeds" commonly means either gross receipts or profits when it enacted the substantive money laundering and forfeiture statutes. It did not use the terms "gross proceeds" or "gross receipts" in Section 1956(a)(1), as it did in other statutes. A profits construction is therefore compelled by the legislative history.

C. The Rule Of Lenity Compels The "Profits" Construction.

As shown, the statutory context and purpose support a "profits" construction. The legislative history also supports a

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[10] The use of the term "gross receipts" in 18 U.S.C. § 1957, also enacted as part of the 1986 Act, was explained in the 1986 House Report: "The term 'gross receipts' was used in this provision to indicate that expenses or overhead incurred by the money launderer are not to be subtracted from the forfeitable 'commission.'" 1986 House Report, H.R. REP. NO. 99-855, at 17.

"profits" construction. Even if the Court still finds the term ambiguous (because there are two equally common meanings), the rule of lenity requires that "proceeds" be given the more lenient construction as "profits."

The rule of lenity is grounded in two fundamental principles. First, due process "mandate[s] that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited." *Dunn v. United States*, 442 U.S. 100, 112 (1979). Second, "legislators and not the courts should define criminal activity." *Huddleston v. United States*, 415 U.S. 814, 831 (1974). The rule of lenity applies to situations "in which a reasonable doubt persists about a statute's intended scope even after resort to 'the language and structure, legislative history, and motivating policies' of the statute." *Moskal v. United States*, 498 U.S. 103, 108 (1990). It is rooted in "'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *Id.* (quoting H. FRIENDLY, BENCHMARKS 209 (1967)). The rule of lenity requires that an "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347 (1971) (citing *Rewis v. United States*, 401 U.S. 808, 812 (1971)). "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Bass*, 404 U.S. at 347 (citation omitted). Consequently, when a term is unclear, courts "choose the construction yielding the shorter sentence by resting on the venerable rule of lenity." *United States v. R. L. C.*, 503 U.S. 291, 305 (1992) (citing *Bass*, 404 U.S. at 347-48).

In all events, and at a minimum, the rule of lenity requires that "proceeds" be given the more narrow profits construction.

D. The Government's Alleged Burden In Proving "Profits" Does Not Override The Profits Construction Of Proceeds Compelled By The Statute's Context And The Canons Of Statutory Construction.

1. The Government complains that it will be too difficult to prove profits in money laundering cases, because criminals and criminal enterprises do not keep regular financial records or leave a paper trail that would enable the Government to meet this burden of proof. This is pure speculation that is belied by the Government's arsenal of evidentiary procedures to prove profits.

The Government is required, and able, to prove "net" amounts (such as profits) under a variety of criminal statutes. For example, in order to prove a defendant guilty of income tax evasion, it is not sufficient merely to establish the defendant's gross receipts, since one does not pay taxes on gross income. The Government is given certain leeway in income tax evasion cases, by allowing it to prove net income through indirect or circumstantial evidence, but it is nevertheless required to do so in order to obtain a conviction. *See Holland v. United States*, 348 U.S. 121 (1954). The Government has the choice of three indirect methods to prove an income tax evasion case: (1) the net worth method which is based on the increase in net worth over a year adding any nondeductible expenses and subtracting nontaxable income, *id.* at 125; (2) the bank deposits method which is based on bank deposits in excess of reported income while the taxpayer has a source of taxable income, *United States v. Venuto*, 182 F.2d 519, 521 (3d Cir. 1950); and (3) the expenditures method which is based on the total cash expenditures during the year minus reported income and nontaxable receipts, *United States v. Caserta*, 199 F.2d 905, 906 (3d Cir. 1952).

Moreover, this is not a good case to evaluate the Government's claims concerning difficulties in proving net income. The Government did not attempt to present evidence

at trial that funds used by Santos in the alleged money laundering transactions were "profits," and thus does not know if any accounting issues would have precluded the introduction of such evidence. This is why, in trying to prove its point, the government must resort to speculative hypotheticals and inapposite examples. *See, e.g.*, Gov't Br. 9, 31-32, 35.

As a practical matter, the Government could have used any of several different accounting methods to show profits, methods that have been developed in similar contexts.[11] *See, e.g.*, *Gerardo v. Comm'r*, 552 F.2d 549, 552 n.6 (3d Cir. 1977) ("Since appellant kept no records . . . 'it was proper and indeed necessary to devise some substitute method for reconstructing income.' . . . Where unreported income from gambling is at issue, the projection of average daily gross income is an acceptable method of reconstruction"); *Gordon v. Comm'r*, 572 F.2d 193, 195 (9th Cir. 1977) ("[i]n light of the propriety of similar methodologies for generating the amount of unreported wager income by extrapolation," reconstruction of unreported income for preceding nine months from one day's wagers upheld).[12]

At bottom, the Government's speculative argument about its burden amounts to the single assertion that it will be more difficult to prosecute criminals with a profits construction. While that may or may not be so, respectfully, it is an argument appropriate for Congress, and not this Court, to address and decide.

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[11] In fact, the Government did estimate Santos' profits, but only in a post-trial custody hearing. *See* Tr. 2180-81, *United States v. Jose Almeda, et al.*, No. 2:96CR44 (N.D. Ind. Oct. 16, 1997).

[12] *See also Milicia*, 769 F. Supp. at 887-89 (utilizing "gross profit" measure that permitted deduction from gross revenues only of cost of goods sold). Defining "proceeds" as gross profits ameliorates the Government's concerns (*see* Br. 27-32) about the need to "formulate an accounting theory for illegal businesses" and questions "such as whether illicit profit should be measured using accrual or cash accounting principles; whether profit should be measured on an annual, monthly or other basis; how 'capital expenses' should be amortized; and what costs can legitimately be deducted to arrive at the profit figure."

2. In connection with its assertion about how the "promotion component . . . has traditionally been understood," the Government provides a lengthy string citation of cases in which "prosecutions based on expense payments" were "brought under the promotion subsection of the money laundering statute." Gov't Br. 23-24 & n.3. Any implication that many or most of those cases could not have been prosecuted under the "profits" rule is mistaken. In the first place, most of the opinions do not reveal what the Government could have proved (or did prove) in relation to such a standard. However, the Government plainly did present evidence of profits used to promote the underlying unlawful activity in some of the cases. *See United States v. Thorn*, 446 F.3d 378, 392 (2d Cir. 2006) (reciting testimony that "funds obtained from illegal projects were used to 'finance the next project' and to expand the business and perform additional illegal work'"); *United States v. Johnson*, 297 F.3d 845, 854 (9th Cir. 2002) (government's evidence supporting money laundering convictions for fraud, mail fraud, and wire fraud based on $8.5 million in profit after deducting "direct expenses for the scheme"). Equally important, several other cases involved ongoing fraudulent schemes in which proceeds from individual frauds were (or apparently were) used to underwrite expenses to carry out additional frauds. *See, e.g.*, *United States v. Lawrence*, 405 F.3d 888, 901 (10th Cir. 2005); *United States v. Coscarelli*, 105 F.3d 984, 986 (5th Cir. 1997). This is possible only if the individual frauds are yielding net proceeds, which in and of itself should satisfy the profits requirement. *See Scialabba*, 282 F.3d at 478 (stating that some of the transactions in *United States v. Jackson*, 935 F.2d 832, 839-42 (7th Cir. 1991), "involved reinvestment of net profits").

III. Contrary To The Government's Argument, There Is No "Financial Transaction Which In Fact Involves" Proceeds.

1. The Government's case also fails for an additional reason. The money laundering statute proscribes "a financial transaction which in fact involves the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(1). As the Government says, this requires a "monetary transaction that was separate from and in addition to the underlying criminal activity." Gov't Br. 36-37 (quoting *United States v. Christo*, 129 F.3d 578, 580 (11th Cir. 1997)). Here, however, the only financial transactions the Government showed were: (1) the collection and delivery to Santos of bet money and betting slips, with the "runners" and "collectors" deducting their compensation from bet money before passing on the balance; and (2) the payment of winnings to winning bettors. These are transactions constituting the operation of an illegal gambling business under 18 U.S.C. § 1955(a), not transactions "separate from and in addition to the underlying criminal activity." *Christo*, 129 F.3d at 581.

In *Christo*, money laundering convictions were reversed because "the withdrawal of [bank] funds charged as money laundering was the same as the underlying criminal activity of bank fraud and misapplication of bank funds." *Id.* at 580. Thus, the defendant had not "engaged in a monetary transaction that was separate from and in addition to the underlying criminal activity."[13] *Id.* Similarly, in *United States v. Johnson*, 971 F.2d 562, 567-70 (10th Cir. 1992), money laundering convictions

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[13] *Christo* involved money laundering charged under 18 U.S.C. § 1957. The courts of appeals agree that for purposes of the issue discussed above, "proceeds of specified unlawful activity" under § 1956(a)(1) and "criminally derived property" under § 1957 should be interpreted in the same manner. *E.g., United States v. Mankarious*, 151 F.3d 694, 705-06 & n.1 (7th Cir. 1998); *United States v. Savage*, 67 F.3d 1435, 1442 (9th Cir. 1995). The Government's brief cites § 1956(a)(1) and § 1957 cases interchangeably.

were reversed where the transactions alleged to constitute money laundering were the same wire transmissions necessary for the underlying wire fraud. The court held that "Congress targeted only those transactions occurring after proceeds have been obtained from the underlying unlawful activity." *Id.* at 569; *see also e.g.*, *United States v. McGahee*, 257 F.3d 520, 528 (6th Cir. 2001) (reversing money laundering convictions because "[d]iverting the funds were part and parcel of the fraud and theft, and were not a separate act completed after the crime, as required under [§ 1956(a)(1)]").

2. The Government accepts *Christo* and *Johnson* as valid authority, *see* Gov't Br. 36-37 (quoting *Christo*), 37-38 (quoting *Johnson*), and it initially acknowledges the money laundering statute requires "a separation between *the conduct that constitutes the predicate crime* and the conduct that constitutes money laundering," *id.* at 36 (emphasis added). However, the Government then tries to cut back the scope of its "separation" concession. It contends the separation requirement "means [only] that the 'predicate crime must have produced proceeds in *acts* distinct from the conduct that constitutes money laundering.'" *Id.* (emphasis added) (quoting *United States v. Mankarious*, 151 F.3d 694, 705 (7th Cir. (1998)); *see also id.* ("the money laundering statute 'criminalizes a transaction in proceeds, not the *transaction* that creates the proceeds'") (emphasis added; quoting *Mankarious*). By "acts" producing proceeds and "transaction that creates the proceeds," the Government means – and suggests *Markarious* means – not all of "the conduct that constitutes the predicate crime," but only the component thereof that immediately results in the criminal defendant acquiring proceeds. Gov't Br. 36-38.

Based upon this redefinition, the Government claims that other, subsequent "acts" or "transactions" that are a constituent part of the underlying crime simultaneously constitute the "transaction in proceeds" required by the money laundering statute. *Id.* Applying its theory to the predicate crime in this

case, the Government says the transaction that "generated proceeds" is "a bettor plac[ing] a wager"; hence, it says, "[t]he payments to the couriers and winners thus followed and were distinct from the predicate-offence conduct that generated the proceeds." *Id.* at 40. By this means, the Government seeks to transform "the conduct that constitutes the predicate crime" – which must be separate from the money laundering transaction – into only the particular component of the "predicate-offense conduct" that most immediately or directly "generated the proceeds." The Government's theory is erroneous and should be rejected for several reasons.

First, *Mankarious* involved a different issue: Whether a money laundering transaction can occur before the predicate crime is completed (in that case, before the use-of-the-mails component of mail fraud). *Mankarious*, 151 F.3d at 703-06. While the court answered that question in the affirmative, there was no issue that the money laundering transactions were separate from and in addition to the predicate mail fraud crimes. *Mankarious* involved money laundering under the concealment prong of § 1956(a)(1). The money laundering transactions were payments of the defendants' portion of the mail fraud proceeds to fictitious payees and to front companies those defendants controlled. *Id.* at 706-07.

Second, the *Mankarious* opinion does not indicate even in dicta that the phrases the Government relies upon – *e.g.*, "the transaction that creates the proceeds" – mean the predicate crime may be broken into components, such that some of the "transactions" (or "acts" or "conduct") constituting the predicate crime simultaneously serve as the "transaction in proceeds" necessary for money laundering. Other statements in *Mankarious* negate such an implication. *See id.* at 705 ("Money laundering requires proceeds of a discrete predicate crime"); *id.* at 704 (money laundering requires "'a monetary transaction that was separate from and in addition to the underlying criminal

activity'") (quoting *Christo*, 129 F.3d at 580). The Government is merely singling out certain passages in *Mankarious* that superficially appear to support its theory.

Third, the Government's theory is at odds with the many cases saying a transaction in proceeds under the money laundering statute must "follow" or "come after" the underlying criminal activity is "completed." *See, e.g., United States v. Silvestri*, 409 F.3d 1311, 1334 (11th Cir. 2005) ("'the primary issue in a money laundering charge involves determining when the predicate crime becomes a completed offense after which money laundering can occur'") (quoting *Christo*, 129 F.3d at 579-80); *McGahee*, 257 F.3d at 528 (money laundering requires "a separate act completed after the crime"). This Court itself has said money laundering statutes "interdict only the financial transactions . . . , not the *anterior* criminal conduct that yielded the funds allegedly laundered." *United States v. Cabrales*, 524 U.S. 1, 7 (1998) (emphasis added).

The Government notes that these statements often cannot be taken literally in a temporal sense, since in some circumstances a laundering transaction in proceeds can occur before the underlying crime is completed. Gov't Br. 38. That point, while correct, does not address the "separate transaction" issue.[14] The Government also asserts these cases stand only for the proposition that "the predicate offense must first generate proceeds before those proceeds can be laundered." *Id.* This is not correct.

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[14] There are also situations in which the money laundering transaction may occur simultaneously with completion of the underlying crime. *See, e.g., LeBlanc*, 24 F.3d at 347 (when bet money was collected after bets were lost, defendant had losing gamblers pay by checks to fictitious payees to conceal the source of the funds); *United States v. Pretty*, 98 F.3d 1213, 1220-21 (10th Cir. 1996) (defendant had illegal kickbacks "filtered through real estate transactions" to conceal source of money).

The true import of the cases saying money laundering must come "after" the underlying crime is that a money laundering transaction must be separate, distinct and discrete from the underlying criminal activity. *Christo* itself is an excellent example, stating that money laundering occurs "after" the "predicate crime becomes a 'completed offense,'" 129 F.3d at 579-80 (citation omitted), and then clarifying that this means there must be "a monetary transaction that was separate from and in addition to the underlying criminal activity," *id.* at 580. *See also, e.g., United States v. Greenidge*, 2007 U.S. App. LEXIS 17084, at *33-34 (3d Cir. July 17, 2007) (stating that "to support a charge of money laundering, there must have been a 'discrete predicate crime' which 'produced proceeds in acts distinct from the conduct that constitutes money laundering,'" and accepting "the government's argument that the conspiracy to commit bank fraud was complete when the stolen and altered check was deposited") (quoting *Mankarious*, 151 F.3d at 705); *United States v. Misla-Aldarundo*, 478 F.3d 52, 68 (1st Cir. 2007) (quoting *Mankarious*' statement that "money laundering criminalizes a transaction in proceeds, not the transaction that creates the proceeds," and holding that "[t]he transaction that created the proceeds – the act of extortion – is sufficiently distinct from the side transactions done to hide the trail – *e.g.*, writing checks to relatives and aides – even if both crimes were complete only upon the arrival of the funds in [defendant's] hands").[15]

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[15] *See also United States v. McCarthy*, 271 F.3d 387, 395 (2d Cir. 2001) ("when the underlying crime is completed, a transaction conducted with the proceeds may provide the basis for a money laundering conviction"; "[o]ur case law consistently distinguishes between the crime that produces proceeds and the subsequent crime of laundering those proceeds, even though the transactions may flow together"); *Heaps*, 39 F.3d at 486 ("Although the Tenth Circuit [in *Edgmon*, 952 F.2d at 1213-14] . . . perhaps placed too much emphasis on the temporal distinction between past and future crimes, its insight into Congress' intention is valuable. Congress intended to prevent an ill other than those already prohibited by other laws.").

Fourth, the Government's theory that the money laundering transaction in proceeds can be a component of the predicate crime (after one or more earlier components "generated proceeds") is inconsistent with Congress' intent that the money laundering statute provides "a separate crime distinct from the underlying offense that generated the money," *LeBlanc*, 24 F.3d at 346; "create[s] a new federal crime rather than . . . further punish[es] the underlying criminal activity," *Stavroulakis*, 952 F.2d at 691; and "punish[es] activity that was not previously punished," *Edgmon*, 952 F.2d at 1214.

Fifth, the Government cites no case in which a component of the underlying criminal activity alone was also held to be a "transaction in proceeds" under the money laundering statute. Existing authority is to the contrary. For example, in *United States v. Dimeck*, 24 F.3d 1239 (10th Cir. 1994), the court held that downstream payment by the street seller to the distributor in an illegal drug transaction is not a "transaction in proceeds" under the money laundering statute even though the predicate crime generated proceeds in the street seller's upstream transaction with the buyer.

> For some purposes, the illegal drug sales here were completed when the seller and purchaser exchanged the drugs and the money. The seller of the drugs could have been convicted of distribution at the point of sale even though the proceeds were never returned to [the distributor]. We do not intend to change that traditional sense of when a drug transaction between buyer and seller is complete. However, for purposes of the money laundering statute here being analyzed, the underlying drug transaction had not yet been completed [before the distributor was paid] and the money laundering activity had not yet begun.

Id. at 1246.

The Government may contend that *Febus* and *Iacaboni* support its position, in that the transactions in proceeds there were payments to winning bettors (and, in *Febus*, also the collectors subtracting their commissions before delivering the bet money). However, neither case considered whether those payments were "financial transactions which in fact involved the proceeds" of conducting an illegal gambling business. 18 U.S.C. § 1956(a)(1). Rather, the argument those cases considered and rejected was that these payments could not constitute "promotion" under § 1956(a)(1)(A) because they were part of the predicate crime of conducting an illegal gambling business.

3. In support of its theory, the Government also argues that "proceeds may be derived either 'from an already completed offense' or from 'a completed phase of an ongoing offense.'" Gov't Br. 38 (quoting *Conley*, 37 F.3d at 980). However, "completed phase" in *Conley* means a *completed crime* where the criminal activity (there, conducting an illegal gambling business) is also a continuing crime. After reiterating that money laundering under § 1956 is "intended . . . to apply to transactions occurring after the completion of the underlying criminal activity," the court noted that the laundering transactions involved the disposition of monies "collected from the [video] poker machines" in various business establishments where the gambling activity occurred. 37 F.3d at 980 (citation omitted).

In other words, the "proceeds" of conducting an illegal gambling business in *Conley* was money that remained after the bets were collected and the winners were paid, and the money laundering "transactions in proceeds" involved their subsequent division and distribution. *Id.*; *see also United States v. Morelli*, 169 F.3d 798, 804 (3d Cir. 1999) ("[t]he money laundering aspect of the scheme [in *Conley*] derived from the retrieval and distribution of the money deposited in the machines" after "the specified unlawful activity had been completed"). Here,

by contrast, the Government proved only the core gambling business transactions of collecting bet money and paying winners.[16]

4. The Government finally argues it is not slicing the predicate gambling business offense into component "transactions," but rather is maintaining the distinction between that predicate crime and money laundering, because "the payments to employees and winners" are "not elements of" conducting an illegal gambling business under 18 U.S.C. § 1955. That is so, the Government says, because (1) "[p]roof that payments were made to employees and winners" is not required under 18 U.S.C. § 1955(b)(1); and (2) under Indiana law – which is an essential component of Santos' § 1955 violation – "a gambling offense . . . is complete at the time the wager is placed." Gov't Br. 41 (citing IND. CODE § 35-45-5-3(a)(4) (making it a crime to "sell chances" in "lotteries") and (a)(6) (making it a crime to "accept[] . . . for profit, money . . . risked in gambling")).

The Government is simply wrong on this point. The professional gambling crimes listed in Indiana Code § 35-45-5-3(a) must come within the statutory *definition* of "gambling" provided by Indiana Code § 35-45-5-1. As defined, "gambling" requires "risking money or other property *for gain*, contingent in whole or in part upon lot [or] chance . . . ." IND. CODE § 35-45-5-1 (emphasis added). "Gain" in turn "means the direct realization of winnings." *Id.* Hence, professional gambling under the Indiana statutes requires payment of winners – money must be risked on the possibility of "gain" ("realization of winnings")

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[16] *United States v. Butler*, 211 F.3d 826 (4th Cir. 2000) (Gov't Br. 36), involves the same point in the context of bankruptcy fraud. While the defendant's concealment of assets from the trustee was a continuing offense, he had committed the crime of bankruptcy fraud (a "completed phase of an ongoing offense") in a transaction separate from the later financial transactions charged as money laundering. *Id.* at 828, 829-30.

and that possibility must depend, at least in part, on lot or chance. If there is no possibility of such "gain" – no possibility that a bettor will realize winnings – then there is no "gambling" under Indiana law.

This plain meaning of the Indiana statutes is also confirmed by Indiana case law. Under the current and substantively similar former Indiana statutes, the Indiana courts have repeatedly said that (1) an essential element of an illegal lottery – which is proscribed by § 35-45-5-3(a)(4), and of which Santos' bolita is one type – is one or more "prizes"; and (2) a second essential element is that the prize or prizes be distributed by chance:

> A "lottery" is a scheme for the distribution of prizes by lot or chance . . . . *It has three essential elements: consideration, chance and prize* . . . .
>
> So defined, bingo played for a prize received by chance or lot is a lottery and prohibited by [§] 35-45-5-3(4).

Pruitt v. State, 557 N.E.2d 684, 690-91 (Ind. Ct. App. 1990) (emphasis added) (citing, *inter alia*, *Tinder v. Music Operating, Inc.*, 237 Ind. 33, 40, 142 N.E.2d 610, 614 (1957); *see also L.E. Serv., Inc. v. State Lottery Comm'n*, 646 N.E.2d 334, 340 (Ind. Ct. App. 1995) ("The elements of a violation of [Indiana Code §] 35-45-5-3(a)(6) are . . . (4) money risked in gambling"); *id.* at 342 (gambling is "define[d] . . . as 'risking money . . . for gain, contingent in whole or in part upon lot [or] chance'") (quoting § 35-45-5-1).

As well as incorporating these state law standards, the federal gambling statute adds that conducting an illegal gambling business must "involve[] five or more persons who conduct, finance, manage, supervise, direct or own all or part of such business." 18 U.S.C. § 1955(b)(1)(ii). Hence, the predicate crime

clearly contemplates that the gambling business must involve several individuals, *e.g.*, bet collectors, runners, and owners. Just as paying winners is part of the offense of running an illegal gambling business, so too is paying the individuals required to run the gambling business. Section 1955 "does not prohibit gambling per se; rather, it punishes those who 'conduct[] . . . an illegal gambling *business*.'" *United States v. Wall*, 92 F.3d 1444, 1449 (6th Cir. 1996) (citation omitted) (emphasis in original). *Cf. Sanabria v. United States*, 437 U.S. 54, 70 (1978) (discrete acts of gambling are not independent federal offenses).

Based on its erroneous position concerning when "a gambling offense . . . is completed," the Government argues that "[i]f the law were otherwise, a defendant could avoid violating the statute, while enjoying the profits from his gambling operation, by fraudulently refusing to pay employees and successful bettors." Gov't Br. 41. This makes no sense. A person who never paid employees or winning bettors (as the Government's hypothetical would require "to avoid violating the [gambling] statute") undoubtedly would be guilty of another crime, such as fraud, and perhaps theft as well. Such a person would not, however, be guilty of conducting a *gambling* business.

CONCLUSION

The judgment below should be affirmed.

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No. 06-1005

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

EFRAIN SANTOS AND BENEDICTO DIAZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 06-1005

UNITED STATES OF AMERICA, PETITIONER

v.

EFRAIN SANTOS AND BENEDICTO DIAZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The Seventh Circuit has seriously misconstrued the principal federal money laundering statute, 18 U.S.C. 1956(a)(1), by interpreting the term "proceeds" to mean "profits." As the government's opening brief demonstrates, the statutory text, background, and purposes make clear that "proceeds" instead means "gross receipts." Respondents rely on secondary dictionary definitions, statements in the legislative history, and a claimed need to employ a "profits" definition in order to distinguish money laundering from the underlying crimes. But in the end they are unable to support their contention that Congress would have adopted the onerous and impractical requirement that the government establish that a criminal venture is profitable before a defendant may be held liable for seeking to promote its continued existence or conceal its ill-gotten gains. Section 1956(a)(1) unambiguously reaches all otherwise-covered transactions involving "proceeds," and the court of appeals erred in holding otherwise.

A. The "Gross Receipts" Definition Of "Proceeds" Accords With The Word's Primary Meaning, The Legislative History Of The Money Laundering Statute, And The Meaning That Congress Has Given The Word In Related Statutes

1. Respondents argue (Diaz Br. 7-9; Santos Br. 20-23) that dictionary definitions of "proceeds" establish that the term "may just as easily mean 'profits'" as "gross receipts." Diaz Br. 7. But respondents' dictionary citations establish only that "proceeds" may *sometimes* mean "profits," a fact that the government has never disputed. Respondents have not undercut the government's fundamental point, which is that the *primary* meaning of "proceeds" is "gross receipts."

Respondents do not dispute that dictionaries that list only one meaning of "proceeds" generally give a "gross receipts" definition. See U.S. Br. 14. They also fail to rebut the government's showing that dictionaries that provide more than one definition generally list the "gross receipts" meaning first. Respondents do not cite any dictionary that lists a "profits" definition first. See Diaz Br. 7-8; Santos Br. 21, 22 n.8. Even the dictionaries Santos cites that combine the two meanings in a single entry lead with the "gross receipts" meaning. See *Webster's Universal College Dictionary* 629 (2001); *Webster's New World Dictionary of the American English* 1072 (3d coll. ed. 1988). Although Diaz asserts (Br. 7) that the *Oxford English Dictionary* (2d ed. 1989) (*OED*) does not lead with a gross receipts definition, he is incorrect. The *OED*'s initial definition is "[t]hat which proceeds, is derived, or results from something," a broad description that provides no deduction for costs. 12 *OED* 544. "Profit" is listed last among the five meanings provided. *Ibid.* And respondents do not dispute that the *Random House Dictionary of the English Language* (2d ed. 1987) (*Random House*), which expressly states that it lists first the most frequently used meaning of a word, begins

with the "gross receipts" definition. See *id.* at xxxii, 1542. Because the primary meaning of "proceeds" is "gross receipts," if Congress had intended to limit the money laundering statute to "profits," it likely would have used that word or modified "proceeds" with the adjective "net." Congress's use of the unadorned word "proceeds" signals an intent to employ the word's broader primary meaning.

2. Respondents also incorrectly contend (Diaz Br. 20-23; Santos Br. 23-27) that the legislative history of the money laundering statute supports a "profits" definition of "proceeds." They cite various statements indicating that Congress was concerned about the profitability of criminal organizations and the laundering of "profits." Significantly, none of those statements addresses the meaning of the word "proceeds" or indicates that the statute prohibits only the laundering of profits. The section-by-section analysis of the legislation in the Committee reports never uses the word "profits" to describe laundered "proceeds." See H.R. Rep. No. 855, 99th Cong., 2d Sess. Pt. 1, at 10-24 (1986); S. Rep. No. 433, 99th Cong., 2d Sess. 9-24 (1986). On the contrary, the Senate Report states that Section 1956 proscribes "transactions used to launder the *funds* derived from illegal activity." *Id.* at 9 (emphasis added). The unqualified term "funds" encompasses all money derived from a crime, not just profits. Thus, far from supporting a "profits" definition of "proceeds," the legislative history supports a "gross receipts" definition.

In fact, the "profits" definition would undermine Congress's goal of curtailing criminal activity intended to generate financial gains. It would foreclose prosecutions based on expense payments even when those payments promote criminal activity or conceal ill-gotten funds; it would provide a defense to money laundering charges for criminals whose illicit activities have not yet turned a profit; and it would create serious obstacles to effective enforcement of the statute in

other circumstances. See U.S. Br. 22-32. Thus, to the extent they are relevant, the legislative statements evincing concern about the profitability of criminal activity favor a "gross receipts," not a "profits," definition of "proceeds."

3. The "gross receipts" definition also accords with the meaning of "proceeds" in related statutes, including the RICO forfeiture provision, 18 U.S.C. 1963(a)(3), and the drug forfeiture statute, 21 U.S.C. 853(a)(1), which were enacted just two years before the money laundering statute. Except for the Seventh Circuit, every court of appeals that has addressed the issue has held that "proceeds" in those provisions means "gross receipts." See U.S. Br. 15-16. That conclusion is confirmed by the Senate Report accompanying the legislation, which states that Congress used the word "proceeds" "in lieu of the term 'profits' in order to alleviate the unreasonable burden on the government of proving net profits." S. Rep. No. 225, 98th Cong., 1st Sess. 199 (1983); see *id.* at 211.

Respondents fail to identify even a single statute in which the undefined term "proceeds" means "profits." Santos argues (Br. 28) that "proceeds" in the Racketeer Influenced and Corrupt Organizations Act (RICO) and drug forfeiture statutes may mean "gross profits," *i.e.*, gross receipts minus direct costs, but he is incorrect. No court of appeals has given "proceeds" a "gross profits" meaning, even in the two decisions that he cites. *United States* v. *Lizza Indus., Inc.*, 775 F.2d 492 (2d Cir. 1985), cert. denied, 475 U.S. 1082 (1986), construed a prior version of the RICO statute that did not contain the word "proceeds." And, in *United States* v. *Riley*, 78 F.3d 367, 371 (8th Cir. 1996), the court stated only that, when a business's "gross receipts" include money obtained through legal activity as well as through RICO violations, "something less than [all] gross receipts" would be forfeitable. See *United States* v. *Simmons*, 154 F.3d 765, 770-771 (8th Cir. 1998) (adopting that reading of *Riley* and holding that "pro-

ceeds" in the RICO forfeiture statute means "gross receipts"). Although Santos purports to find support for a "gross profits" meaning in the Senate Report's reference to "net profits," the Report uses "net profits" interchangeably with "profits," as the quotation cited above indicates. Notably, the term "gross profits" does not appear in the Report.[1]

Diaz takes a different tack, arguing that the government's reliance on forfeiture statutes is misplaced because those statutes generally "sweep more broadly than the definition of the associated offense." Br. 15. He points out, for example, that the forfeiture provision for illegal gambling covers *"[a]ny property * * * used* in" the offense, not just the proceeds. Br. 14 (quoting 18 U.S.C. 1955(d)). As that example indicates, however, when forfeiture statutes sweep more broadly than the associated offenses, they do so by using words other than proceeds that have broader meanings. Nothing about the explicitly broader scope of certain forfeiture provisions suggests that the *identical word* "proceeds" should be given a different meaning in a forfeiture statute than in a statute defining a substantive offense.

In any event, offense-defining statutes also use the term "proceeds" to mean "gross receipts," including statutes that delineate offenses similar to money laundering. For example, 18 U.S.C. 2339C (Supp. V 2005) prohibits the concealment of funds or "proceeds" of funds intended for use in financing terrorism, and it expressly defines "proceeds" to mean "any funds derived from or obtained, directly or indirectly, through" commission of a terrorism-financing offense. 18 U.S.C. 2339C(c)(2) and (e)(3) (Supp. V 2005). Another statute,

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[1] Indeed, the RICO and drug forfeiture statutes themselves make clear that "proceeds" has a broader meaning than either "profits" or "gross profits." See 18 U.S.C. 1963(a) ("In lieu of a fine otherwise authorized by this section, a defendant who derives *profits or other proceeds* from an offense may be fined not more than twice the *gross profits or other proceeds*.") (emphasis added); 21 U.S.C. 853(a) (same).

18 U.S.C. 1202(b), criminalizes the interstate transmission or receipt of the "proceeds" of a state-law kidnapping offense. It is highly unlikely that Congress intended a kidnapper to escape liability for interstate transmission of the ransom payment because the payment did not exceed the expenses of the abduction.

Santos also contends (Br. 29) that the term "proceeds" in the money laundering statute cannot mean "gross receipts" because Congress has used the terms "gross receipts" and "gross proceeds" in other criminal statutes. But, as Diaz concedes (Br. 12-13), Congress sometimes uses different words to mean the same thing. See U.S. Br. 20. Moreover, under Santos's logic, the term "proceeds" also could not mean "profits," because Congress has used that term in other criminal statutes as well. See *id.* at 21 (citing statutes).[2]

Nor is there merit to Diaz's related argument (Br. 12) that, if Congress had intended "proceeds" to mean "gross receipts" in the money laundering statute, it would have included an express definition, as it did in Section 2339C(e)(3) and 18 U.S.C. 981(a)(2)(A), a civil forfeiture provision. Both of those provisions were enacted after the Seventh Circuit held in *United States* v. *Masters*, 924 F.2d 1362, 1369-1370,

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[2] As we explain in our opening brief (at 19 & n.2), Congress used the terms "proceeds," "gross receipts," and "gross proceeds" interchangeably in the different subsections of the general criminal forfeiture statute, 18 U.S.C. 982 (2000 & Supp. V 2005), depending on when each subsection was enacted. Santos asserts (Br. 28) that "gross proceeds" has a broader meaning than "proceeds" in the statute, but he makes no effort to explain how the various subsections of the statute could be rationalized under such a reading. For example, Section 982(a)(2)(A) authorizes the forfeiture of the "proceeds" of a mail fraud offense affecting a financial institution, while Section 982(a)(8) authorizes the forfeiture of the "gross proceeds" of a mail fraud offense involving telemarketing. There is no reason why Congress would have wanted the scope of the forfeiture to be broader for telemarketing fraud than for fraud affecting a financial institution.

cert. denied, 500 U.S. 919, and 502 U.S. 823 (1991), that "proceeds" in the RICO forfeiture statute means "profits." Given the uncertainty created by *Masters*, Congress may have wanted to clarify its intent that "proceeds" be given its primary meaning. Moreover, Diaz's argument proves too much, because Congress has also included express definitions of "proceeds" where the term means "gross receipts" less certain costs. See 18 U.S.C. 981(a)(2)(B) and (a)(2)(C).

B. The "Gross Receipts" Definition Gives The Money Laundering Statute Its Proper Scope

1. Diaz also contends (Br. 15-20) that a "profits" definition of "proceeds" "fits best with" the money laundering statute's "two key concepts"—promotion and concealment. On the contrary, a "gross receipts" definition best advances the statute's purpose of preventing criminals from using the fruits of their crimes to promote or to conceal their illegal activities. All of the gross receipts of a crime can be used to promote further crime. And concealing the gross receipts of a crime would, if anything, be more effective in impeding its detection than concealing profits from the crime. See U.S. Br. 21-22.

Diaz mistakenly argues (Br. 15-17) that paying an activity's expenses cannot "promote" criminal activity. He contends that promoting an activity means facilitating its expansion, and that paying an activity's expenses enables it only to survive, not to expand. But one can promote an activity not only by enabling it to expand but also by enabling it to continue. The dictionary definition of "promote" on which Diaz himself relies makes that clear. See 12 *OED* 616 (defining promote as "to further the * * * progress of" or, more generally, "to further, advance, encourage"); see also, *e.g.*, *Random House* 1548 (defining "promote" as "to help or encourage to exist or flourish"). Moreover, paying the expenses of an activity can facilitate its expansion, for example, by enhancing its reputation. See *United States* v. *Iacaboni*, 363 F.3d 1, 5

(1st Cir.) ("[N]othing makes an illegal gambling operation flourish more than the prompt payment of winners.") (citation omitted), cert. denied, 543 U.S. 978 (2004). Indeed, the Seventh Circuit found that the expense payments in this very case did precisely that. See *United States* v. *Febus*, 218 F.3d 784, 790, cert. denied, 531 U.S. 1021 (2000). Thus, instead of giving "promote" its proper meaning, a "profits" definition of "proceeds" would unduly constrict the statute by precluding prosecution of transactions in which criminals use the receipts from criminal activity to promote the continuation and expansion of that activity.

2. Diaz also erroneously contends (Br. 18-20) that a "profits" definition is consistent with the concealment subsection of the money laundering statute. He asserts that expense payments cannot constitute money laundering under the concealment subsection because they are not made to hide the tainted source or nature of the funds involved. But the need for concealment arises from the threat of detection posed by large amounts of unexplained cash. The threat of detection and corresponding need to conceal depend on the existence of cash without any legitimate explanation, not on whether the cash represents profits or the results of an illicit, but unprofitable, transaction. It is not hard, moreover, to imagine a transaction designed both to cover an expense of the underlying crime and to conceal the nature or source of the funds—*e.g.*, the purchase of a stash house by a drug trafficker in the name of an innocent third party. In addition, under a "profits" definition, the statute would not apply to a transaction designed to conceal illicit funds that will eventually be used to pay the expenses of a criminal operation, such as temporarily depositing those funds in a third party's bank account. Nor would it apply to a transaction that is designed to conceal the proceeds of criminal activity that has not yet become profitable. Con-

gress could not have wanted to exclude those efforts to elude detection of crime from the statute's coverage.

Santos does not contest that a "profits" definition of "proceeds" makes no sense for concealment cases. Instead, he argues (Br. 19) that courts can give "proceeds" a different meaning in those cases. That argument is illogical. The term "proceeds" appears in the introductory language of Section 1956(a)(1), which applies equally to both the promotion and the concealment subsections of the statute. See Pet. App. 15a-16a. "To give th[at] same word[] a different meaning" for concealment cases than for promotion cases "would be to invent a statute rather than interpret one." *Clark* v. *Martinez*, 543 U.S. 371, 378 (2005).

C. The "Profits" Definition Would Impose Unreasonable Burdens On The Government And The Courts

A "profits" definition would also seriously impede the enforcement of the statute in those money laundering cases that it did not outright preclude.

1. For example, prosecutions of money launderers, including professionals, who did not participate in the predicate crime form a vital component of the government's enforcement efforts. *E.g.*, *United States* v. *Flores*, 454 F.3d 149 (3d Cir.), cert. denied, 127 S. Ct. 614 (2006); *United States* v. *Awada*, 425 F.3d 522 (8th Cir. 2005); *United States* v. *Wert-Ruiz*, 228 F.3d 250 (3d Cir. 2000); *United States* v. *Giraldi*, 86 F.3d 1368 (5th Cir. 1996); *United States* v. *Wynn*, 61 F.3d 921 (D.C. Cir.), cert. denied, 516 U.S. 1015 (1995). The government explains in its opening brief that the "profits" definition would make it very difficult to convict those professional money launderers, because it will frequently be impossible to prove that they knew that the funds they handled were profits. U.S. Br. 11, 29. Neither Santos nor Diaz offers any response.

2. A "profits" definition would also create enforcement difficulties in other cases because criminal enterprises often do not keep accounting records, much less records that are accurate, complete, and decipherable by law enforcement. Respondents assert that concern about inadequate records is "speculat[ive]" (Santos Br. 31) and "[u]nsubstantiated" (Diaz Br. 23). But even the court below acknowledged that "criminals do not always keep ready records," and that could "complicate the government's task of proving promotional money laundering" under a "profits" definition. Pet. App. 13a; see *United States* v. *Grasso*, 381 F.3d 160, 169 n.13 (3d Cir. 2004) (making similar observation), vacated and remanded on other grounds, 544 U.S. 945 (2005), reinstated in relevant part, 197 Fed. Appx. 200 (3d Cir. 2005). Congress too has recognized the "extreme difficulty in this conspiratorial, criminal area of finding hard evidence of net profits," and, for that reason, rejected a "profits" definition of "proceeds" in the RICO and drug forfeiture provisions. S. Rep. No. 225, *supra*, at 199 (citation omitted); *id.* at 211. Neither the availability of some records in this case nor Diaz's citation of a handful of other cases in which some records were available (Br. 27-28) suggests that records adequate to prove profits are generally available. Indeed, Diaz himself acknowledges that "[t]he incentive to avoid creating a paper trail, or to manipulate whatever trail is created, exists in every criminal case." Br. 24.

Diaz also cites a government study stating that, in 2001, almost half of the prosecutions in which money laundering was the lead offense were predicated on "property offenses." Br. 26 (citing Bureau of Justice Statistics, U.S. Dep't of Justice, *Money Laundering Offenders 1994-2001*, at 6, Table 2 (2003) (*Money Laundering Study*) <http://www.ojp.usdoj.gov/bjs/pub/pdf/mlo01.pdf.)>. Diaz asserts that property offenses—which include embezzlement, fraud, transportation of stolen property, and counterfeiting—"tend[] to generate

business records or other financial evidence." Br. 26. But it is far from clear that those offenses commonly generate the kind of records necessary to prove profits. Embezzlers, for example, are unlikely to keep ledgers showing the expenses that they incurred in their illegal activities. In any event, more than half of the prosecutions in which money laundering was the lead charge were predicated on non-property offenses, including drug trafficking, which are unlikely to generate reliable records of profits. *Money Laundering Study* 6, Table 2. And, in cases in which money laundering was not the most serious charge, 94% of money laundering charges were predicated on non-property offenses. *Id.* at 8.

Diaz argues (Br. 32-33) that forfeiture and sentencing cases show that the government is able to prove profits. But forfeiture statutes generally do not require proof of profits. See U.S. Br. 15-20. Although the Seventh Circuit (unlike every other court of appeals) has construed the word "proceeds" in the RICO and drug forfeiture statutes to mean "profits," Diaz is not correct that proof of "profits" under those provisions has been "*routine*[]." Br. 32. The government has found it to be very burdensome, even though neither the reasonable doubt standard nor the rules of evidence apply. See Stefan D. Cassella, *Asset Forfeiture Law in the United States* § 18-5(d), at 552-553 (2007); Fed. R. Evid. 1101(d)(3). Because of the proof difficulties, prosecutors in drug cases frequently rely on alternative forfeiture provisions that do not require proof of proceeds. See 21 U.S.C. 853(a)(2) (providing for forfeiture of any "property used, or intended to be used * * * to commit, or to facilitate" a drug offense). And, in racketeering cases, prosecutors have permitted defendants to stipulate to amounts of forfeitable "proceeds" that the prosecutors believe are significantly less than the actual "profits" earned by the defendants. See, *e.g.*, *United States* v. *Warner*, No. 06-3517, 2007 WL 2363220 (7th Cir. Aug. 21, 2007). In contrast,

in money laundering cases, the government would face the beyond-a-reasonable-doubt standard and would have no alternative charges that did not require proof of profits. At the same time, defendants would be highly unlikely to stipulate to a critical element of the money laundering offense.

Nor do cases involving sentencing for bribery offenses show that the government could prove "profits" in money laundering cases. As Diaz notes, the Sentencing Guidelines provide for an offense level increase based on the "net value" of the "benefit received" for a bribe. See, *e.g.*, Sentencing Guidelines § 2C1.1(b)(2) & comment. (n.3). At sentencing, however, unlike at trial, the government need prove its case only by a preponderance of the evidence, and it is unconstrained by the Federal Rules of Evidence. See *United States* v. *Watts*, 519 U.S. 148, 156 (1997) (per curiam); Fed. R. Evid. 1101(d)(3). Moreover, several courts of appeals have held that the defendant, not the government, bears the burden of proving the costs that should be subtracted in determining the net benefit. See *United States* v. *DeVegter*, 439 F.3d 1299, 1305 (11th Cir. 2006); *United States* v. *Glick*, 142 F.3d 520, 525 (2d Cir. 1998); *United States* v. *Landers*, 68 F.3d 882, 885 (5th Cir. 1995); but see *United States* v. *Sapoznik*, 161 F.3d 1117, 1119 (7th Cir. 1998). Thus, the sentencing cases shed little light on the government's ability to prove profits as an element of a money laundering offense.

Santos similarly argues (Br. 31) that tax evasion cases show the government's ability to prove net amounts using indirect methods. But the indirect methods of proof used in tax cases are difficult and consume substantial resources. See *Holland* v. *United States*, 348 U.S. 121, 125 (1954); Roger M. Olsen, *Criminal Tax Procedure* § 1401, at 255 (1995 ed.). Moreover, the government is often able to charge alternative criminal tax violations that do not require proof of a tax deficiency. See, *e.g.*, 26 U.S.C. 7203 (failure to file return); 26

U.S.C. 7206 (filing false return). It is unlikely that Congress had an unspoken intent that the government prove routine money laundering cases using complex and burdensome methods drawn from tax prosecutions, particularly when there are no alternative money laundering charges available if those methods prove too onerous in a particular case.

Moreover, the indirect methods of proof used in tax cases do not readily translate to money laundering cases. The principal method used in tax cases requires calculation of the taxpayer's "net worth." See *Holland*, *supra*. But what would it mean to calculate the "net worth" of a criminal activity? Even assuming that the "net worth" concept could be applied to a criminal activity, its application would present significant difficulties.

In addition, the indirect methods of proof used in tax cases depend on accounting and procedural rules contained in the tax code and regulations. It is unclear which, if any, of those rules would apply to the determination of "profits" in a money laundering case. See U.S. Br. 33-35. In particular, several rules that facilitate the government's ability to prove a tax deficiency might well not apply. For example, in tax evasion prosecutions, the government may rely on deductions claimed by the taxpayer on his tax return, and the burden of going forward is generally on the taxpayer to establish deductions not reported. See, *e.g.*, *United States* v. *Kayser*, 488 F.3d 1070, 1073 (9th Cir. 2007); *United States* v. *Garguilo*, 554 F.2d 59, 62 (2d Cir. 1977). The Seventh Circuit has given no indication that a similar burden-shifting rule would apply to proof of expenses in a money laundering prosecution.

3. Respondents also take issue with the government's observation that a "profits" definition of "proceeds" would encumber the courts with complicated questions about what accounting principles should apply to criminal enterprises. Neither respondent disputes that accounting issues will arise,

and Diaz acknowledges that they are "unavoidable." Br. 30. But respondents assert (Diaz Br. 30-31; Santos Br. 32) that the government will have broad discretion to choose the relevant accounting principles. Although that is a generous concession, it is unlikely defendants would be so accommodating at actual money laundering trials conducted under a "profits" definition. Disputes would be certain to arise over difficult issues, including the relevant criminal activity for purposes of assessing profitability; the time period over which profits should be measured; what items qualify as income and expense; and how to differentiate between the payment of expenses and the reinvestment of profits in the case of continuing criminal activity. Even the court below acknowledged that "the line between the payment of expenses and reinvestment of net income is, generally speaking, murky" and that "determining what is and is not net income" could "complicate" money laundering trials. Pet. App. 13a.

Diaz argues (Br. 32) that the sentencing and forfeiture experience discussed above shows that courts can develop the necessary accounting principles. But, as we have already pointed out, most courts of appeals do not require the government to prove profits in forfeiture cases. And none of the cases cited by Diaz supports his claim that courts in the Seventh Circuit have successfully "identif[ied] and appl[ied] the necessary accounting principles" in forfeiture cases. *Ibid.*[3]

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[3] In *Masters*, 924 F.2d at 1369-1370, the court of appeals affirmed the forfeiture determination even though the court below had not calculated "profits," because the only asserted expenses were payments to co-defendants, who were jointly liable for the forfeited amount. In *United States* v. *Genova*, 333 F.3d 750, 761 (7th Cir. 2003), the court of appeals reversed the forfeiture verdicts because the lower court had not required proof of profits. *United States* v. *Arthur*, No. 04-CR-122, 2006 WL 2992865, at *1 (E.D. Wis. Oct. 18, 2006), involved forfeiture under 18 U.S.C. 982(a)(1) (Supp. V 2005), which provides for forfeiture of "property * * * involved in" the underlying offense, not profits. And, in *United States* v. *Dote*, 150 F. Supp. 2d 935 (N.D. Ill. 2001),

Diaz is also not assisted by sentencing cases involving proof of the net benefit from bribes. Bribery cases frequently involve the payment of a bribe to obtain a specific contract provided by an otherwise legitimate business. In that context, standard financial accounting records are readily available, and the determination of net benefit is relatively straightforward. Nonetheless, accounting disputes have still arisen in bribery sentencing cases, and resolution of those disputes has divided the courts of appeals. Compare, *e.g.*, *United States* v. *Pena*, 268 F.3d 215, 219-220 (3d Cir. 2001) (where benefit obtained from bribe is ability to operate illegal business, deduction of business's expenses is not required), cert. denied, 536 U.S. 960 (2002), with *Sapoznik*, 161 F.3d at 1119 (deduction of expenses is required). Courts facing accounting issues at sentencing can consult the Sentencing Guidelines, and the Sentencing Commission is available to provide additional guidance if necessary. But no comparable sources of guidance could resolve the accounting issues posed by a "profits" interpretation of the word "proceeds" in the money laundering statute. Given the lack of guidance, it is unlikely that Congress intended to saddle the courts with those difficult issues.

D. A "Profits" Definition Is Not Needed To Maintain A Distinction Between Money Laundering And The Predicate Offense

1. Respondents also incorrectly argue (Diaz Br. 30-38; Santos Br. 9-16) that the "profits" definition is necessary to maintain a distinction between money laundering and the underlying offense. As we explain in our opening brief (at 36-42), that distinction is maintained by another provision of the money laundering statute—the requirement that there be a distinct financial transaction that "involves the proceeds" of

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the court merely denied a motion to dismiss an indictment that included a forfeiture charge without determining the appropriate amount of forfeiture.

the predicate crime. 18 U.S.C. 1956(a). The "profits" definition is thus unnecessary to maintain a separation between money laundering and the predicate offense and, as described above, it would do so at the cost of unnaturally constricting the scope of the statute and impairing its enforcement.

Diaz contends (Br. 34-36) that the "distinct transaction" approach produces illogical results. For example, he asserts (Br. 35) that it "makes no economic sense" that a bank robber's payment of his accomplices using the proceeds from a bank robbery should qualify as money laundering, whereas the accomplices' payment of themselves by keeping whatever they found at the cashiers' window would not qualify as money laundering (because the robbery and the payment of the accomplices would be a single transaction).

A "profits" definition would not, however, avoid differential treatment of conduct that has similar economic effects. Suppose that several bank robbers agreed to share the profits of a robbery. If they paid themselves in the same way as the accomplices in Diaz's hypothetical, and each paid his share of the expenses of the crime, there would be no money laundering offense under a "profits" definition. But there could be a money laundering offense if they pooled the loot to pay the expenses and then later divided the profits.

Moreover, the differential treatment that Diaz describes simply reflects Congress's decision to criminalize as money laundering only transactions that involve pre-existing, illicitly-obtained funds. Because of that decision, criminals may sometimes make expenditures that promote criminal activity without committing money laundering. And that will be true under either a "profits" or a "gross receipts" definition of "proceeds." For example, under either definition, a would-be criminal would not commit money laundering if he invested in his criminal enterprise before engaging in any crime. But the same criminal would face money laundering

charges if he waited and made the investment using the profits of his criminal activity.

Furthermore, contrary to Diaz's assertion (Br. 34), a "profits" definition alone would not ensure the separation of the money laundering offense and the underlying crime. Absent a distinct-transaction requirement, the bank robbers in the above hypothetical, who agreed to share the profits of the robbery by keeping what each of them took from the cashiers' window, would simultaneously commit both bank robbery and money laundering when they stole the money (provided it exceeded the expenses of the crime). A distinct-transaction requirement, rather than an artificial "profits" rule, therefore best effectuates Congress's intent to punish money laundering only when it is a separate offense.

2. Santos agrees with the government (Br. 34) that the money laundering statute requires the laundering transaction to be distinct from the predicate offense. He claims, however, that his payment of winners and collectors did not satisfy that requirement, and he suggests that this Court should affirm the court of appeals' judgment on that alternative ground. See Br. 34-43. Santos raised a virtually identical claim on direct appeal, the Seventh Circuit rejected that claim, and this Court denied certiorari. See *Febus*, 218 F.3d at 789 (rejecting argument that the evidence was insufficient to convict Santos of money laundering "because his cash payments to the bolita's collectors and winners were essential transactions of the illegal gambling business, and thus cannot also constitute transactions under the promotion provision of the money laundering statute"). Santos did not renew the claim in his motion for collateral relief, see Pet. App. 24a-25a, and the courts below did not address it. Moreover, the issue is not "fairly included" in the question on which this Court has granted review—the construction of the statutory term "proceeds." *Yee* v. *Escondido*, 503 U.S. 519, 533 (1992). Under

those circumstances, it would be inappropriate for this Court to affirm the judgment below based on Santos's claim, even if it had merit. See *Withrow* v. *Williams*, 507 U.S. 680, 720-721 (1993) (Scalia, J., concurring in part and dissenting in part) (issue decided adversely on direct review cannot be relitigated on collateral attack); *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 39 (1989) (Court ordinarily will not consider argument not raised below as alternative ground for affirmance).

In any event, Santos's claim lacks merit. He asserts (Br. 36, 39) that the distinct transaction requirement is not met because compensating collectors and paying winners constituted "components" of the underlying federal gambling offense. That is not so. Paying collectors and winners may be necessary for a gambling business to be successful (just as a getaway car may be necessary for a bank robbery to succeed), but those payments are not essential elements of a gambling offense under 18 U.S.C. 1955 (any more than use of a getaway car is an element of the offense of bank robbery).

Santos's arguments to the contrary (Br. 41-43) are unpersuasive. Neither the federal illegal gambling statute, 18 U.S.C. 1955, nor the state statutes on which the Section 1955 offense was predicated require proof of payments to employees or winners in order to establish a violation. See U.S. Br. 41-42. Santos notes (Br. 42) that one element of the federal offense is that the illegal gambling business involves five or more persons. There is, however, no requirement that those persons be employees who have been paid a salary. See 18 U.S.C. 1955(b)(2)(ii). Santos also seeks support (Br. 41) from the definition of "gambling" in Indiana Code Annotated § 35-45-5-1 (LexisNexis Supp. 2006) as "*risking* money or other property for gain" (emphasis added). But money is risked for gain when a gambler places a bet in expectation of a possible payout, even if he does not win, or the gambling enterprise never intends to pay him. Nor is Santos helped by

Indiana's definition of a "lottery" as "a scheme for the distribution of prizes by lot or chance." *Pruitt* v. *State*, 557 N.E.2d 684, 690 (Ind. Ct. App. 1990). A person who sells chances that purport to offer the prospect of a prize is guilty of "selling chances" in a such a scheme whether or not he is willing or able to supply the prize.

3. Both respondents contend (Diaz Br. 37-38; Santos Br. 9-16) that, under a "gross receipts" definition of "proceeds," virtually every violation of the federal illegal gambling statute, 18 U.S.C. 1955, would constitute money laundering. They argue that Congress could not have intended to impose the greater penalties for money laundering simply for committing the underlying crime. No doubt, certain criminal enterprises, such as gambling businesses and drug-trafficking operations, need to launder money in order to survive and to prosper. If they are to stay in business and to expand, gambling businesses must pay their winners and collectors, and drug kingpins must pay their couriers and purchase new stock-in-trade. But it is precisely those types of transactions—transactions that facilitate the continuation and expansion of criminal activity—that Congress targeted in the promotion subsection of the money laundering statute. When those transactions are separate and distinct from the elements of the underlying offense, they may constitute money laundering. Allowing a defendant to defeat a money laundering charge on the ground that money laundering was otherwise integral to his criminal operation would undermine the purpose of the statute.

E. The Rule Of Lenity Does Not Support A "Profits" Definition of "Proceeds"

In the end, respondents place heavy reliance (Diaz Br. 29-30; Santos Br. 38-40) on the rule of lenity. That reliance is mistaken. The purposes of the rule are to ensure that defendants have fair warning of the boundaries of criminal conduct and that Congress, not the judiciary, defines criminal liability.

See *Crandon* v. *United States*, 494 U.S. 152, 158 (1990). The rule should therefore not be applied when it would create a host of new uncertainties about the scope of the criminal statute, which would have to be resolved by the courts. That is precisely what would occur if this Court adopted a "profits" definition of "proceeds." See pp. 13-14, *supra*; U.S. Br. 29-32.

Moreover, the rule of lenity has the greatest force when the broader reading of a statute threatens to criminalize conduct that reasonable people could regard as innocent. See *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 703-704 (2005). But there is no danger of that here, because the money laundering statute's *mens rea* requirement ensures that innocuous conduct will not be criminalized. See 18 U.S.C. 1956(a)(1)(A)(i) and (B)(i) (requiring intent to promote specified unlawful activity or knowledge that transaction is intended to conceal the character of the proceeds of specified unlawful activity).

Finally, the rule of lenity comes into play only "after seizing everything from which aid can be derived" in order to prevent courts from having to "make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138 (1998) (internal quotation marks and citation omitted). Here, no guesswork is required: Congress intended "proceeds" to mean "gross receipts."

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

SEPTEMBER 2007

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No. 06-1005

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA

Petitioner,

v.

EFRAIN SANTOS AND BENEDICTO DIAZ

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

The principal federal money laundering statute, 18 U.S.C. 1956(a)(1), makes it a crime to engage in financial transactions using the "proceeds" of specified unlawful activities with the intent to promote those activities or to conceal the proceeds. The question presented is whether "proceeds" means the gross receipts from the unlawful activities or only the profits, *i.e.*, the gross receipts less expenses.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files *amicus curiae* briefs on various issues in this Court and other courts and has filed *amicus curiae* briefs in previous suits related to 18 U.S.C. §1956. See *Whitfield* v. *United States*, 543 U.S. 209, 211 (2005) ("whether conviction for conspiracy to commit money laundering . . . requires proof of an overt act in furtherance of the conspiracy"); *United States* v. *Cabrales*, 524 U.S. 1, 3 (1998) (discussing the appropriate venue for trial of money-laundering offenses); see also *Cuellar* v. *United States*, 478 F.3d 282 (5th Cir. 2007), *petition for cert. filed*, No. 06-1456 (U.S. May 3, 2007).

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

STATEMENT OF THE CASE

Respondents Santos and Diaz were convicted for their roles in the operation of an illegal lottery in Indiana. The participants or gamblers in the lottery placed their bets with "runners" who took a percentage of the money as a commission and delivered the balance of the money and betting slips to "collectors." The collectors in turn provided the remainder of the money and the betting slips to Santos, and received a salary or commission for doing so from the money collected. Respondent Diaz was a collector in the operation. Pet. App. 2a, 19a.

In addition to being convicted under 18 U.S.C. § 1955 for his involvement in the illegal gambling operation, and under 18 U.S.C. § 371 for conspiracy to violate Section 1955, Santos also was convicted of money laundering under 18 U.S.C. § 1956(a)(1)(A)(i), and conspiracy to commit money laundering under 18 U.S.C. § 1956(h). Pet. App. 2a-3a. For his part, Diaz was convicted, after a guilty plea, of conspiracy to commit money laundering under 18 U.S.C. § 1956(h). *Id.* at 3a.

Section 1956 of the Act prohibits financial transactions using the "proceeds" of "specified unlawful activity . . . with the intent to promote the carrying on of specified unlawful activity." 18 U.S.C. § 1956(a)(a)(A)(i). With respect to Santos, the money laundering convictions were based upon Santos' payments to the lottery's collectors and winners. Diaz's conviction was based on his receipt of payment for his collection services. Pet. App. 6a. Thus, the money laundering convictions were premised on the theory that these payments were made and received with the intent and design to "promote the carrying on" of the illegal lottery.

As a result of his money laundering conviction, Santos was sentenced to 210 months in prison – nearly four times longer than the maximum five year sentence for committing the

underlying gambling offense. Pet App. 18a, 20a. Diaz received a shorter sentence on the basis of his guilty plea.

SUMMARY OF ARGUMENT

In the decision below, the United States Court of Appeals for the Seventh Circuit correctly interpreted the term "proceeds" in 18 U.S.C. § 1956(a)(1)(A)(i) to mean profits. This interpretation properly limits the scope of § 1956 consistent with Congress' intent in enacting the Money Laundering Control Act of 1986 (the "Act"), 18 U.S.C. §§ 1956-1957. The clear goal of the Act was to criminalize the process of giving ill-gotten gains the appearance of legitimacy through financial transactions – classic "money-laundering" operations – and thus to prevent the concealment and spread of criminal activity. See 132 Cong. Rec. S9626 (daily ed. July 24, 1986) (statement of Sen. Thurmond) ("Creation of a money laundering offense is imperative if our law enforcement agencies are to be effective against the organized criminal groups which reap profits from unlawful activity by camouflaging the proceeds through elaborate laundering schemes."). Congress did not intend to punish defendants twice for the same conduct by imposing additional penalties for the underlying activity that generates the illegal proceeds. See 132 Cong. Rec. S9938 (daily ed. July 31, 1986) (statement of Sen. D'Amato) ("we are creating a new crime of money laundering"). But, that is precisely what Petitioner's broad interpretation of the Act would do.

Notwithstanding the limited purpose of the Act, amici's experience is that the instant case reflects a typical and growing use of § 1956 as a vehicle for increasing potential sentences substantially in excess of what otherwise would be permissible for the underlying conduct – without any showing of the aggravated societal harm that the money laundering statute was designed to redress; that is, the disposition of ill-gotten gains to expand criminal enterprises or to disguise those gains by creating the appearance of legitimate wealth.

Because the Seventh Circuit's holding would prevent this misuse of § 1956, *amici* urge the Court to affirm.

ARGUMENT

I. THE MONEY LAUNDERING STATUTE IS SUBJECT TO EXPANSIVE INTERPRETATIONS THAT INVITE PROSECUTORIAL MISUSE.

This case highlights the inappropriate and unfair misuse of the money laundering statute to "tack on" additional charges and significantly enhanced penalties to punish conduct that is virtually indistinguishable from the underlying offense. The basis for the money laundering charges at issue here is the payment of winnings to the participants in the illegal lottery and the payment (and receipt) of salaries to the lottery's employees. That very same conduct was integral, not supplemental, to the continuing operation of the illegal lottery. But as a result of the additional money laundering charges, Respondents faced potential sentences of twenty years – four times longer than the five year maximum for the underlying offense. Indeed, Santos' actual sentence was close to that increased maximum. Pet App. 18a, 20a. Such an application of the Act was not intended by Congress. See *United States* v. *Stavroulakis*, 952 F.2d 686, 691 (2d Cir. 1992) (citing S. Rep. No. 99-433 (1986) and H.R. Rep. No. 99-855 (1986)); *United States* v. *Johnson*, 971 F.2d 562, 569 (10th Cir. 1992).

Congress's intent in enacting the money laundering statutes in 1986 was to fill a discrete gap in the criminal law by preventing the hiding and reinvestment of proceeds derived from criminal activity. See *United States* v. *Edgmon*, 952 F.2d 1206, 1213-14 (10th Cir. 1991) (discussing legislative history). Notwithstanding this clear intent, many courts have adopted extraordinarily expansive interpretations of the statute, applying it in circumstances that unfairly penalize defendants without doing anything to advance the statutory purpose.

For instance, the term at issue in this case – "proceeds" – has been construed in a variety of ways designed to broaden the statute's scope. The Government's theory in this case illustrates one such expansive reading. In other cases, contrary to the plain language of the statute, "proceeds" has been held to include worthless items. See *United States* v. *Akintobi*, 159 F.3d 401, 403-04 (9th Cir. 1998) (holding that, although the term "may refer to something of value," it "has the broader meaning of 'that which is obtained . . . by any transaction,'" and therefore included checks that "ultimately proved worthless because the accounts backing them up were either empty or closed") (citation omitted); see also *United States* v. *Estacio*, 64 F.3d 477, 480 (9th Cir. 1995), *as amended on denial of reh'g* (noting that courts "define the term broadly," and holding that "proceeds" included "[a] fraudulently obtained line of credit, which results in an artificially inflated bank balance").

The expansive interpretations of the term "proceeds" are all the more troubling because prosecutors and courts have also undermined the limiting effect of other essential terms in the statute, such as the "conceal or disguise" element and the "transaction" element. For example, the Second Circuit recently upheld the money laundering conviction of the owner of an armored-car business for transportation of cash, without requiring any evidence that the cash transportation was designed to create the appearance of legitimate wealth. *United States* v. *Ness*, 466 F. 3d 79, 81 (2d Cir. 2006), *petition for cert. filed*, No. 06-1604 (U.S. June 1, 2007).

Some courts also have found the "conceal" element satisfied when the defendant has done no more than commingle the proceeds of lawful and unlawful activity in a single bank account. See *United States* v. *Posters 'N' Things, Ltd.*, 969 F.2d 652, 661 (8th Cir. 1992) (deposit by "head shop" owner of shop proceeds into business account), *aff'd on other grounds*, 511 U.S. 513 (1994); *United States* v. *Sutera*, 933 F.2d 641, 648 (8th Cir. 1991) (deposit of gambling

proceeds into family business account bearing defendant's name).

Courts have broadly interpreted other provisions of § 1956 as well. To be convicted under § 1956(a)(1), a defendant must have conducted a "financial transaction," which § 1956(c)(4) defines as "a transaction which in any way or degree affects interstate or foreign commerce" involving, inter alia, "the movement of funds by wire or other means." Some courts have construed the phrase "or other means" to be virtually unlimited. See, *e.g.*, *United States* v. *Reed*, 77 F.3d 139, 143 (6th Cir. 1996) (delivery of money by courier "involved the movement of funds by wire or other means") (internal quotations omitted); *United States* v. *Wydermyer*, 51 F.3d 319, 326-27 (2d Cir. 1995) ("physical transportation of money out of the United States by hand" is a financial transaction by "other means"); *United States* v. *Dimeck*, 24 F.3d 1239, 1246 (10th Cir. 1994) (noting that physical delivery of cash is "movement of funds by wire or by other means"). According to one commentator, such interpretations have "the potential to extend the reach of the money laundering statute to any movement of property and greatly expand its scope." John K. Villa, *Banking Crimes* § 8:10 (2006). Another commentator expressed a similar concern:

> The continuing trend toward widening what is meant by financial transaction gives prosecutors ever more leeway in deciding when to use [section] 1956, because the occurrence of some kind of financial transaction is what triggers liability under the statute. In short, the pattern is that interpretations have become more draconian over time.

Mariano-Florentino Cuellar, *Tenuous Relationship between the Fight against Money Laundering and the Disruption of Criminal Finance*, 93 J. Crim. L. & Criminology 311, 348 (2003).

As a result of such expansive interpretations of these terms, many courts now punish as "money laundering" conduct that bears virtually no relation to the concept as it is commonly understood. See *United States* v. *Skinner*, 946 F.2d 176 (2d Cir. 1991) (sale of cocaine sufficient for conviction under the money laundering statute). "[T]he fluidity of the judicial understanding of these concepts means that defenses based on grammar and logic seem doomed to failure." Mary McNamara & Edward W. Swanson, *Money Laundering: How Prosecutors Clean Up under 18 U.S.C. Sections 1956 and 1957*, 26 Forum 61 (1999), available at http://www.smhlegal.com/articles/money520laund.pdf (last visited Aug. 21, 2007). These interpretations raise serious concerns that the power of prosecutors to bring a defendant's conduct within the statute has been unfairly and improperly expanded. "Distinctions in the details of [sections] 1956 and 1957 [a companion money laundering statute] should not obscure the prevailing pattern in the way courts parse the statutes' abstruse terms: with just occasional exceptions, over time the statutes' interpretation has tended to favor prosecutors." Cuellar, 93 J. Crim. l. & Criminology at 343.

II. EXPANSIVE INTERPRETATIONS OF § 1956 HAVE SIGNIFICANT NEGATIVE RAMIFICATIONS FOR THE CRIMINAL JUSTICE SYSTEM.

As this case demonstrates, an overbroad reading of the principal money laundering statute will have severe consequences for the many criminal defendants accused of violating it, and for the criminal justice system as a whole. Section 1956 imposes harsh penalties: a statutory maximum of up to twenty years' imprisonment and a fine of either $500,000 or twice the value of the property involved in the transaction, whichever is greater. Additionally, although the Sentencing Guidelines were amended in 2001 in an effort to "tie[] offense levels for money laundering more closely to the underlying conduct," U.S. Sentencing Guidelines Manual app. C, amend. 634 (2001), reason for amend. (2006), money

laundering charges can, as in this case, result in a sentence far greater than that for the predicate offense alone when the offense is not a drug trafficking crime. Villa, § 11:30 (Supp. 2006); see also Cuellar, *supra*, at 348-49 (2001 Sentencing Guidelines amendments left sentences for money laundering "severe enough that prosecutors and investigators could use money laundering charges as substitutes for underlying predicate offense charges that might be more difficult to prove against particular defendants"). Conviction under § 1956 automatically adds two offense levels to the base level offense applicable to the underlying offense, even if no other sentencing enhancements apply. USSG § 2S1.1(b)(2)(B).

The prospect of a higher sentence allows prosecutors to extract plea bargains and forfeitures that might not otherwise be obtained and that may not be in the interest of justice. See Eric J. Gouvin, *Are There Any Checks and Balances on the Government's Power to Check Our Balances? The Fate of Financial Privacy in the War on Terrorism*, 14 Temp. Pol. & Civ. Rts. L. Rev. 517, 534-35 (2005) (noting, in the context of anti-money laundering provisions in the USA PATRIOT Act, that "prosecutors have used money laundering violations as a device to leverage up the criminal consequences for regulated behavior, creating incentives for the accused to plea bargain"). Because an indictment with a § 1956 charge risks heavier sentence than does an indictment (for the same conduct) without such a charge, prosecutors have a great incentive to threaten such a charge to enhance their bargaining leverage. The mere threat of a money laundering charge thus can be a powerful weapon in the prosecutor's negotiating arsenal.

This vast increase in potential punishment is entirely unjustifiable if it is not accompanied by greater culpability on the part of the accused – and, specifically, by the culpability that Congress meant to punish when it enacted the statute in the first place. Instead, prosecutors and courts have interpreted § 1956 to apply to the myriad crimes where funds

are merely an aspect of the enterprise at issue and therefore to embrace conduct that comes nowhere close to presenting the dangers to society that the money laundering statute was designed to address. Defendants, including Respondents here, should not face enhanced potential sentences for conduct not meaningfully more blameworthy than the underlying predicate offenses.

III. THE SEVENTH CIRCUIT'S INTERPRETATION PROPERLY LIMITS THE SCOPE OF THE ACT.

The Seventh Circuit's interpretation of the term "proceeds" as limited to profits is consistent with congressional intent and necessary to prevent defendants from inappropriately being punished twice (and more severely) for the same conduct. Petitioner's argument to the contrary is unpersuasive, and actually demonstrates that Respondents' underlying conduct is indistinguishable from that which forms the basis of the money laundering charge.

Petitioner argues that the money laundering offense is separate and distinct from the gambling offense because "[p]roof that payments were made to employees or to winners is not required to establish a violation" of the underlying gambling statute, 18 U.S.C. § 1955(b)(1). Br. for U.S. at 41. But such an "identity of the elements" test does not answer the question presented here as to exactly what the elements of a money-laundering charge are. Petitioner's argument also fails in its additional effort to diminish concern about unfair multiplicity of charges. Even Petitioner admits that a charge under § 1955, which prohibits "illegal gambling *businesses*," requires a showing that the operation "must remain in continuous operation for more than 30 days or have gross revenue of at least $2,000 in any given day." *Id.* (emphasis added). Accordingly, the elements and purpose of § 1955 expressly contemplate the operation of a business, which itself implies the payment of expenses (and thus, "promotion" in Petitioner's view as well, see *infra*), along with the receipt of revenues – precisely the same requirements for application

of the money-laundering statute under Petitioner's expansive interpretation. There is thus every reason for concern that follow-on § 1956 charges may be purely "make weight" and open to arbitrary and capricious application.

Petitioner also contends that the payments made to employees or to winners make it possible for the operation to continue and thus amounts to "promotion" under the money laundering statute. See *id.* at 23. Thus, at least in those instances in which the basis for the § 1955 violation is the continuing operation of the scheme, Petitioner apparently would concede that the conduct which amounts to "promotion" is indistinguishable from the conduct supporting the § 1955 charge.

Interpreting "proceeds" to mean only profits avoids the problem of unfair multiplicity by ensuring that a money laundering charge is based on what Congress intended – the re-investment of illegal *profits* to *expand* unlawful activities.

CONCLUSION

For the foregoing reasons, as well as those stated in Respondents' Briefs, the judgment of the Seventh Circuit should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

EFRAIN SANTOS AND BENEDICTO DIAZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The principal federal money laundering statute, 18 U.S.C. 1956(a)(1), makes it a crime to engage in financial transactions using the "proceeds" of specified unlawful activities with the intent to promote those activities or to conceal the proceeds. The question presented is whether "proceeds" means the gross receipts from the unlawful activities or only the profits, *i.e.*, the gross receipts less expenses.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 461 F.3d 886. The opinion of the district court granting in part respondent Santos's motion for collateral relief (Pet. App. 17a-50a) is reported at 342 F. Supp. 2d 781. The opinion of the district court granting in part respondent Diaz's motion for collateral relief (Pet. App. 51a-79a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 2006. On November 13, 2006, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including December 23, 2006. On December 14, 2006, Justice Stevens further extended the time within which to file a petition to and including January 22, 2007, and the petition was filed on that date. The petition was granted on April 23, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-9a.

STATEMENT

The principal federal money laundering statute criminalizes financial transactions using the "proceeds" of specified unlawful activities to promote those activities or to conceal the proceeds. 18 U.S.C. 1956(a)(1). Respondents Efrain Santos and Benedicto Diaz were convicted of money laundering and conspiracy to commit money laundering based on the use of the proceeds of an illegal gambling business to promote the business by paying its employees and winning bettors. The United States Court of Appeals for the Seventh Circuit affirmed orders of the United States District Court for the Northern District of Indiana that granted respondents collateral relief from their convictions. The court of appeals held that respondents had not committed money laundering because "proceeds," as used in Section 1956(a)(1), means the "profits" or "net income" of the underlying crime, rather than the "gross receipts" of that crime. Pet. App. 1a-16a. This Court has granted review of that holding.

1. Section 1956(a)(1) makes it a crime when anyone,

> knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—
>
> > (A)(i) with the intent to promote the carrying on of specified unlawful activity; or * * *

> (B) knowing that the transaction is designed in whole or in part—
>
> > (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.

18 U.S.C. 1956(a)(1).

Section 1956 defines "specified unlawful activity" to include, among a variety of other offenses, the racketeering crimes enumerated in 18 U.S.C. 1961(1) (Supp. IV 2004). See 18 U.S.C. 1956(c)(7)(A). The racketeering offenses listed in Section 1961(1) in turn include the running of an illegal gambling business, in violation of 18 U.S.C. 1955. See 18 U.S.C. 1961(1) (Supp. IV 2004).

2. From the 1970s through the 1990s (except for a brief period in the late 1970s and early 1980s), Santos operated an illegal lottery, known as a bolita, in northwest Indiana. Gamblers placed bets with the bolita's runners, primarily at restaurants and taverns. The runners took a commission from the bet money and then delivered the betting slips and remaining money to collectors. After taking a "salary" out of those funds, the collectors delivered the slips and the rest of the money to Santos. Santos paid the bolita's winners out of the funds collected. Diaz was a collector in the operation. Pet. App. 2a, 19a.

Based on that conduct, Santos was convicted, after a jury trial, of running an illegal gambling business, in violation of 18 U.S.C. 1955, conspiracy to commit that offense, in violation of 18 U.S.C. 371, promotional money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i), and conspiracy to commit that offense, in violation of 18 U.S.C. 1956(h). Pet. App. 2a-3a. Diaz was convicted,

after a guilty plea, of conspiracy to commit money laundering, in violation of Section 1956(h). *Id.* at 3a. The money laundering charges against Santos were premised on his payments to the bolita's collectors and winners. The charge against Diaz was based on his receipt of payment for his collection services. *Id.* at 6a.

Santos was sentenced to concurrent terms of 60 months of imprisonment for the illegal gambling convictions and 210 months of imprisonment for the money laundering convictions. Diaz was sentenced to 108 months of imprisonment. Pet. App. 3a.

3. On direct appeal, Santos challenged his money laundering convictions. *United States* v. *Febus*, 218 F.3d 784, 789 (7th Cir.), cert. denied, 531 U.S. 1021 (2000). He contended that the payments to the collectors and winning bettors did not "promote" the bolita because they were "essential transactions of the illegal gambling business" and thus merely completed the gambling offense. *Ibid.* He argued that the money laundering statute "only punishes the practice of reinvesting the proceeds of an already completed unlawful activity to promote the expansion of that unlawful activity." *Ibid.*

The court of appeals rejected that argument. The court relied on Seventh Circuit precedent holding that "[a] transaction satisfies the promotion provision of the money laundering statute if it constitutes 'the practice of plowing back proceeds of [the illegal activity] to promote that activity.'" *Febus*, 218 F.3d at 789 (quoting *United States* v. *Jackson*, 935 F.2d 832, 842 (7th Cir. 1991)). The court concluded that the government had proved that type of promotion in this case by establishing that Santos had "reinvested the bolita's proceeds to ensure its continued operation for over 5 years." *Id.* at 790. The court explained that the "payments to [the]

collectors * * * compensated them for collecting the increased revenues and transferring those funds back to [Santos]. And [the] payments to the winning players promoted the bolita's continuing prosperity by maintaining and increasing the players' patronage." *Ibid.* The court noted that the annual receipts of the bolita expanded from approximately $250,000 in 1989 to approximately $410,000 in 1994. *Ibid.*

Diaz, for his part, challenged the district court's refusal to allow him to withdraw his guilty plea. Diaz argued that the government had breached the plea agreement by failing to seek a downward departure for substantial assistance. The court of appeals concluded that Diaz did not provide substantial assistance because he failed to give complete, truthful, and candid testimony at the trial of his co-conspirators. The court of appeals therefore upheld the district court's refusal to allow Diaz to withdraw his plea. *Febus*, 218 F.3d at 790-791.

Accordingly, the court of appeals affirmed respondents' convictions. *Febus*, 218 F.3d at 798. Santos petitioned for a writ of certiorari, and this Court denied the petition. 531 U.S. 1021 (2000).

4. After respondents' convictions became final on direct review, the Seventh Circuit reversed money laundering convictions stemming from acts very similar to those committed by respondents. In *United States* v. *Scialabba*, 282 F.3d 475 (7th Cir.), cert. denied, 537 U.S. 1071 (2002), the defendants provided video poker and slot machines to bars, restaurants, and other retail outlets. Each week, the defendants opened the machines and collected any deposited money, which they then used to reimburse the outlet owners for payments to winning customers, to compensate the outlet owners for their role, to lease the gambling machines, and to obtain

the amusement licenses necessary to operate the machines. See *id.* at 476. Based on those expenditures, the *Scialabba* defendants were convicted of laundering the proceeds of an illegal gambling operation, in violation of 18 U.S.C. 1956(a)(1)(A)(i). The court of appeals vacated the money laundering convictions. It held that funds used to cover the expenses of an illegal activity are not "proceeds" within the meaning of Section 1956(a)(1) because the word "proceeds" means only the "net income" or "profits" of illegal activity. See *Scialabba*, 282 F.3d at 478.

The government petitioned for rehearing en banc, arguing that the term "proceeds" in the money laundering statute means "gross receipts" and is not limited to profits. The petition was denied by an evenly-divided court, with one judge recused. See Pet. App. 8a n.3. The government then unsuccessfully petitioned for a writ of certiorari on the same issue. *United States* v. *Scialabba*, 537 U.S. 1071 (2002).

5. Following the decision in *Scialabba*, respondents filed motions for collateral relief under 28 U.S.C. 2255 (2000 & Supp. IV 2004). The district court granted the motions in part and vacated respondents' money laundering convictions. Pet. App. 17a-79a.

The district court concluded that it was not precluded from granting relief by the Seventh Circuit's affirmance of Santos's money laundering convictions in *Febus*. The district court reasoned that *Febus* and *Scialabba* addressed different issues: "while the *Scialabba* court concerned itself with the interpretation of the term 'proceeds,' as used in § 1956(a)(1), the *Febus* [c]ourt was not asked to, and therefore did not decide *anything* about the term 'proceeds.'" Pet. App. 44a, 73a. The district court then held that respondents were

entitled to the benefit of *Scialabba*, because, under the Seventh Circuit's narrow interpretation of "proceeds," they stood convicted of conduct that did not violate the money laundering statute. *Id.* at 45a-49a, 73a-78a. The district court explained that *Scialabba* undermined respondents' money laundering convictions because "the proceeds admittedly used by Santos to pay winners and couriers [including Diaz] *could only have been gross* proceeds." *Id.* at 49a; see *id.* at 77a-78a.

6. The government appealed to the Seventh Circuit with a request for initial en banc consideration. The court of appeals denied the request for initial en banc consideration. Pet. App. 80a. A panel of the court subsequently reaffirmed *Scialabba* and upheld the judgments of the district court. *Id.* at 1a-16a.

The court of appeals explained that, under the doctrine of stare decisis, its decision in *Scialabba* was entitled to "considerable weight." Pet. App. 9a. Although the court believed that "[t]he government [had] raise[d] several important points in favor of its position," the court concluded the government's arguments were not sufficient to satisfy the heavy standard for overturning circuit precedent. *Id.* at 10a; see *id.* at 14a-15a.

The court of appeals acknowledged that, since *Scialabba* was decided, several other courts of appeals had addressed the meaning of "proceeds" in Section 1956(a)(1), and "all the other circuits" had "rejected *Scialabba's* approach." Pet. App. 10a. See *id.* at 10a-12a (discussing *United States* v. *Grasso*, 381 F.3d 160 (3d Cir. 2004), vacated and remanded on other grounds, 544 U.S. 945 (2005), reinstated in relevant part, No. 03-1441 (3d Cir. May 20, 2005); *United States* v. *Iacaboni*, 363 F.3d 1 (1st Cir.), cert. denied, 543 U.S. 978 (2004); and

United States v. *Huber*, 404 F.3d 1047, 1058 (8th Cir. 2005)).

The court of appeals then considered the government's contention that *Scialabba* had eviscerated the promotional subsection of Section 1956(a)(1) by limiting the crime of money laundering to situations in which criminals conceal their proceeds. The court stated that the government was reading the *Scialabba* opinion too broadly. The court explained that, "[w]hile, under *Scialabba*, the act of paying a criminal operation's expenses out of its gross income is not punishable under § 1956(a)(1)(A)(i)—but rather is punishable as part of the underlying crime—the act of reinvesting a criminal operation's net income to promote the carrying on of the operation is still punishable under § 1956(a)(1)(A)(i)." Pet. App. 12a.

Addressing the government's contention that the "profits" rule impedes enforcement of the money laundering statute, the court acknowledged that interpreting "proceeds" to mean "net income" could cause "evidentiary problems" for the government and complicate the work of judges and juries. Pet. App. 13a. The court explained that "criminals do not always keep ready records of their dealings, and, when they do, the line between the payment of expenses and reinvestment of net income is, generally speaking, murky, especially given the likely absence of accounting standards." *Ibid.* Nevertheless, the court did not believe that this "solid policy point" was enough to justify overruling *Scialabba*. *Ibid.*

The court of appeals also observed that the sentencing consequences of *Scialabba* would weaken the government's hand in combating large-scale gambling operations. Pet. App. 13a-14a. The court explained that, if the government is unable to establish a business's net

income, the statutory maximum for a defendant engaged in an illegal gambling operation falls from 240 months of imprisonment under Section 1956(a)(1) to 60 months of imprisonment under Section 1955(a). *Id.* at 13a. See *id.* at 13a-14a (noting that, unlike the Sentencing Guidelines for illegal gambling, the Guidelines for money laundering provide for greater punishment if a larger amount of funds are laundered).

The court of appeals concluded that "the government ha[d] demonstrated that the question of whether Congress intended the term proceeds in § 1956(a)(1)(A)(i) to mean gross or net income is a debatable one." Pet. App. 14a. The court determined, however, that the government's showing was not compelling enough to justify overturning circuit precedent. *Id.* at 14a-15a. Accordingly, the court affirmed the district court's orders granting respondents collateral relief. *Id.* at 16a.

SUMMARY OF ARGUMENT

A. The term "proceeds" in the federal money laundering statute, 18 U.S.C. 1956(a)(1), means "gross receipts," not "profits" as the Seventh Circuit held. The primary meaning of "proceeds" is "gross receipts"—the total amount produced by a transaction or activity. This Court generally presumes that Congress intends a word to have its primary meaning unless there are contrary indications in the relevant statute. Nothing in the money laundering statute suggests that Congress intended "proceeds" to have a different meaning. The "gross receipts" definition also accords with the meaning that Congress has given the term "proceeds" in related statutes. For example, just two years before Congress enacted the money laundering statute, it used the term "proceeds" in amending the forfeiture provision of

the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1963(a)(3), and in enacting the drug forfeiture statute, 21 U.S.C. 853(a). Judicial decisions interpreting those provisions, as well as their legislative histories, make clear that Congress used the term "proceeds" for the specific purpose of covering all gross receipts and not only profits. Indeed, the Senate Report on the RICO statute states that Congress used the "term 'proceeds' * * * in lieu of the term 'profits' in order to alleviate the unreasonable burden on the government of proving net profits." S. Rep. No. 225, 98th Cong., 1st Sess. 199 (1983). There is no reason to believe that Congress deviated from that approach when it enacted the money laundering statute shortly thereafter and again used the word "proceeds."

B. The "gross receipts" definition of "proceeds" gives the money laundering statute its proper scope. The gross receipts of a crime reflect the magnitude of the criminal activity. All of the gross receipts can be used to promote further crime. And concealing the gross receipts can be just as effective in impeding detection and prosecution of the crime as concealing any profits from the crime. In contrast, the "profits" definition of "proceeds" would constrict the money laundering statute in ways that Congress could not have intended. For example, it would foreclose prosecutions based on a criminal's payment of the expenses of his crime even when those payments promote the continuation or expansion of the illegal business or conceal the origins of the ill-gotten funds. The "profits" definition would also give a defense against money laundering charges to criminals whose illicit activities have not yet turned a profit. Yet those criminals have just as great a need—and no greater entitlement—to avoid detection

by laundering their ill-gotten funds. And those criminals can use the receipts from their crimes to promote further crimes just as effectively as criminals whose initial crimes were profitable.

C. The "profits" definition of "proceeds" would also create serious obstacles to effective enforcement of the money laundering statute in those cases that it did not outright preclude. The government would be required, in every money laundering case, to prove that the predicate criminal activity was profitable and that the alleged money launderer knew that the funds he was laundering were profits. That would be an unreasonable burden because criminal enterprises rarely keep accounting records, much less records that are accurate, complete, and decipherable by law enforcement. Moreover, it would be particularly difficult for the government to prove that professional money launderers knew that the funds they laundered were profits. Those defendants are unlikely to have participated in the predicate crime, and they generally have no reason to inquire into the profitability of that crime, because it does not affect the need for their services. The "profits" definition would also encumber the courts with complicated and novel questions about what accounting principles should apply to criminal enterprises. Because there is no clear body of authority to resolve those issues, money laundering trials would likely turn into a battle of accounting experts—arduous, expensive, and confusing for all concerned. Congress could not have intended to saddle the government and the courts with those burdens.

D. Neither of the justifications offered by the court of appeals for its "profits" definition withstands scrutiny. The court of appeals asserted that its definition was necessary to avoid convicting defendants for both

money laundering and the underlying offense based on the same conduct. But other elements of the money laundering statute ensure that the money laundering offense and the underlying crime remain distinct. The money laundering statute can be violated only when there is a separate financial transaction that "involves the proceeds" of the underlying crime. 18 U.S.C. 1956(a)(1). The laundering transaction thus cannot occur until the crime's proceeds have been realized. The court of appeals also reasoned that the "profits" definition is required by the rule of lenity. But that rule applies only if, after employing all available tools of statutory construction, the Court can make no more than a guess as to what Congress intended. Here, based on the text, context, history, and purposes of the statute, Congress's intent is clear: Congress intended "proceeds" to mean "gross receipts."

ARGUMENT

THE TERM "PROCEEDS" IN THE MONEY LAUNDERING STATUTE MEANS "GROSS RECEIPTS" RATHER THAN "NET INCOME" OR "PROFITS"

Contrary to the view of the court of appeals that "proceeds" in the principal federal money laundering statute means the "profits" of illegal activity, the text, background, and purposes of the statute all confirm that Congress instead intended "proceeds" to have its more common and far more practical meaning of "gross receipts." Accordingly, a defendant violates the money laundering statute by conducting a financial transaction with the receipts of specified illegal activity, with the intent to promote that activity or to conceal the proceeds, whether or not those receipts represent profits.

A. Construing "Proceeds" To Mean "Gross Receipts" Reflects The Word's Primary Meaning And The Meaning That Congress Has Given It In Related Statutes

1. This Court generally presumes that Congress intends a word to have its most common and primary meaning unless there are contrary indications in the statute. See, *e.g.*, *Muscarello* v. *United States*, 524 U.S. 125, 128 (1998); *BP Am. Prod. Co.* v. *Burton*, 127 S. Ct. 638, 643-644 (2006). The primary meaning of "proceeds" is the total amount produced by a transaction or activity—in short, "gross receipts." Nothing in the money laundering statute suggests that Congress intended to depart from that ordinary meaning.

The initial definitions of "proceeds" provided by the *Random House Dictionary of the English Language* (2d ed. 1987), which lists first the most frequently encountered meaning of a word, *id.* at xxxii, are "something that results or accrues" and "the *total* amount derived from a sale or other transaction." *Id.* at 1542 (emphasis added). The dictionary offers "profits" only as a secondary, less common definition. *Ibid.* Likewise, *Black's Law Dictionary* (8th ed. 2004) defines "proceeds" as "1. The value of land, goods, or investments when converted into money; the amount of money received from a sale. * * * 2. Something received upon selling, exchanging, collecting, or otherwise disposing of collateral." *Id.* at 1242. *Black's Law Dictionary* distinguishes "proceeds" from "net proceeds," which, in a subentry under "proceeds," it defines as "[t]he amount received in a transaction minus the costs of the transaction (such as expenses and commissions)." *Ibid. Webster's Third New International Dictionary* (2002) also leads with the "gross receipts" definition of "proceeds"—"what is produced by or derived from something (as a

sale, investment, levy, business) by way of *total revenue*: the *total* amount brought in." *Id.* at 1807 (emphasis added). Likewise, the *Oxford English Dictionary* (2d ed. 1989) lists the "gross receipts" meaning of "proceeds" first. See 12 *id.* at 544.

Moreover, dictionaries that provide only one definition for "proceeds" generally give a "gross receipts," rather than "net income," definition. See, *e.g.*, *Cambridge Advanced Learner's Dictionary* 1005 (2005) ("the amount of money received from a particular event or activity or when something is sold"); *Cambridge Dictionary of American English* 677 (2000) ("the amount of money received from a particular sale or event"); *Compact Oxford English Dictionary of Current English* 902 (rev. 2d ed. 2003) ("money obtained from an event or activity"); *Funk & Wagnalls New Standard Dictionary of the English Language* 1974 (1946) ("The useful or material results of an action or course; also, that which accrues from possession, as of a check; the sum derived from the disposal of goods, work, or the use of capital."); *The Oxford American Dictionary and Language Guide* 793 (1999) ("money produced by a transaction or other undertaking"); *Webster's New International Dictionary of the English Language* 1972 (2d ed. 1958) ("That which results, proceeds, or accrues from some possession or transaction; esp., the amount realized from a sale of property."); see also, *e.g.*, *A Dictionary of Modern American Usage* 524 (1998) ("the value of land, goods, or investments when converted into money"); *Prentice Hall Encyclopedic Dictionary of English Usage* 301 (2d ed. 1993) ("amount realized from a sale").

2. The "gross receipts" definition also accords with the meaning that Congress has given the term "proceeds" in related statutes.

a. Most notable are two forfeiture provisions that Congress enacted just two years before the money laundering statute. See Comprehensive Forfeiture Act of 1984, Pub L. No. 98-473, Tit. II, §§ 302, 303, 98 Stat. 2040, 2044-2045 (18 U.S.C. 1963(a), 21 U.S.C. 853(a)). Judicial decisions interpreting those provisions, as well as their legislative histories, make clear that Congress used the term "proceeds" in those provisions for the specific purpose of covering all gross receipts and not only profits.

In 1984, Congress substantially amended the forfeiture provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, to resolve a disagreement among the courts of appeals over whether the provision, as originally enacted, provided for the forfeiture of the profits and other proceeds of racketeering activities. The amended provision states that a RICO offender must forfeit "any property constituting, or derived from, any *proceeds* which the person obtained, directly or indirectly, from racketeering activity." 18 U.S.C. 1963(a)(3) (emphasis added). All but one of the courts of appeals that have addressed the issue have held that the word "proceeds," as used in the RICO provision, means "gross receipts," not "profits." See *United States* v. *Simmons*, 154 F.3d 765, 770-771 (8th Cir. 1998); *United States* v. *DeFries*, 129 F.3d 1293, 1313-1314 (D.C. Cir. 1997); *United States* v. *Hurley*, 63 F.3d 1, 21 (1st Cir. 1995), cert. denied, 517 U.S. 1105 (1996). As with the money laundering statute, see pp. 7-8, *supra*, the Seventh Circuit is the sole exception. See *United States* v. *Genova*, 333 F.3d 750, 761 (2003) (reaffirming *United States* v. *Masters*, 924 F.2d 1362, 1369-1370, cert. denied, 500 U.S. 919 and 502 U.S. 823 (1991)).

The legislative history of the RICO provision confirms that "proceeds" is not limited to profits. The Senate Judiciary Committee Report explains that Congress used the "term 'proceeds' * * * in lieu of the term 'profits' in order to alleviate the unreasonable burden on the government of proving net profits." S. Rep. No. 225, 98th Cong., 1st Sess. 199 (1983). Noting the "extreme difficulty in this conspiratorial, criminal area of finding hard evidence of net profits," the Senate Report states that "[i]t should not be necessary for the prosecutor to prove what the defendant's overhead expenses were." *Id.* at 199 & n.24 (quoting *United States* v. *Jeffers*, 532 F.2d 1101, 1117 (7th Cir. 1976), aff'd in part and vacated in part, 432 U.S. 137 (1977)).

In the same legislation that amended the RICO forfeiture provision, Congress also provided for the forfeiture of "any property constituting, or derived from, any *proceeds* the person obtained, directly or indirectly, as the result of" a violation of the federal drug laws. 21 U.S.C. 853(a) (emphasis added). Every court of appeals that has considered the meaning of "proceeds" in the drug forfeiture statute, once again with the lone exception of the Seventh Circuit, has concluded that the word means "gross receipts." See *United States* v. *Casey*, 444 F.3d 1071, 1076 n.4 (9th Cir.), cert. denied, 127 S. Ct. 532 (2006); *United States* v. *Keeling*, 235 F.3d 533, 537 (10th Cir. 2000), cert. denied, 533 U.S. 940 (2001); *United States* v. *McHan*, 101 F.3d 1027, 1041-1042 (4th Cir. 1996), cert. denied, 520 U.S. 1281 (1997); but see *United States* v. *Jarrett*, 133 F.3d 519, 530-531 (7th Cir.), cert. denied, 523 U.S. 1112 (1998). That conclusion is supported by the Senate Report, which states that the term "proceeds" was used in the drug forfeiture statute for the same reason that it was used in the RICO forfei-

ture provision. See S. Rep. No. 225, *supra*, at 211. The Senate Report also notes that "the same type of property is now subject to civil forfeiture under 21 U.S.C. 881(a)(6)," *ibid.*, which likewise uses the word "proceeds." As the Fourth Circuit observed in *McHan*, Section 881(a)(6) "has never been interpreted to permit a deduction for the costs of illicit drug transactions." 101 F.3d at 1042.

Nothing suggests that Congress deviated from its approach in the RICO and drug forfeiture statutes when it enacted the money laundering statute shortly thereafter and again used the term "proceeds." The difficulty of proving profits is just as substantial in the money laundering context as in the RICO and drug forfeiture contexts. And if the money laundering statute did not reach the concealment of drug proceeds unless the drug crimes were profitable, a drug dealer could lawfully conceal the gross proceeds of his crime and potentially evade the forfeiture of *all* receipts, contrary to Congress's clear intent. The only logical conclusion is that "proceeds" has the same meaning in the money laundering statute as it has in the RICO and drug forfeiture provisions.

b. That conclusion is buttressed by the fact that Congress has also used "proceeds" to mean "gross receipts" in other related statutes. For example, Congress explicitly defined "proceeds," as used in 18 U.S.C. 2339C(c)(2) (Supp. IV 2004), which proscribes the concealment of the "proceeds" of funds intended for use in financing terrorism, to mean "*any* funds derived from or obtained, directly or indirectly, through the commission of" a terrorism financing offense. 18 U.S.C. 2339C(e)(3) (Supp. IV 2004) (emphasis added). And, in *United States* v. *Silvestri*, 409 F.3d 1311, cert. denied, 126 S. Ct.

772 (2005), the Eleventh Circuit concluded that the word "proceeds" in 18 U.S.C. 1957, another money laundering statute, means "total revenue" or "the total amount brought in." 409 F.3d at 1333 (quoting *Webster's Third New International Dictionary* 1807 (3d ed. 1961)).

The "gross receipts" definition of "proceeds" also accords with how Congress has treated cases comparable to this one under the general forfeiture statutes. For civil forfeiture cases that (like this one) involve illegal goods, services, or activities, Congress has expressly defined "proceeds" to mean all property obtained as a result of the offense, "not limited to the net gain or profit." 18 U.S.C. 981(a)(2)(A).[1] The general criminal for-

[1] Congress has adopted a different definition of "proceeds" for two limited categories of civil forfeiture. First, in cases involving *lawful* goods or services that are sold or provided in an illegal manner, the statute requires subtraction of "the direct costs incurred in providing the goods or services," but it does not authorize deduction of overhead or income tax expenses, and it requires the forfeiting party to bear the burden of proving the costs. 18 U.S.C. 981(a)(2)(B). Second, in cases involving fraud in the process of obtaining a loan or extension of credit, the statute allows the forfeiting party to claim a "deduction" from the amount of forfeiture "to the extent that the loan was repaid." 18 U.S.C. 981(a)(2)(C). Notably, in both provisions, Congress carefully defined the category of costs that may be deducted, thus reducing the administrative burdens on the courts. Moreover, recognizing that proving costs will be difficult even under the preponderance-of-the-evidence standard applicable to forfeitures, Congress shifted the burden of proof to the forfeiting party—explicitly in Section 981(a)(2)(B), and implicitly in Section 981(a)(2)(C), by providing for a "deduction" only upon that party's request. Nothing in the two civil forfeiture provisions suggests that Congress intended to vary from its reliance on the primary definition of "proceeds" in statutes defining criminal offenses. On the contrary, as the legislative history of the civil forfeiture provisions indicates, Congress believed that, even in the forfeiture context, it generally "makes no sense" to construe "proceeds" to mean "net profits,"

feiture statute also uses "proceeds" to mean all property obtained from the offense. That statute uses the terms "proceeds," "gross receipts," and "gross proceeds" interchangeably in its different subsections, depending on when each subsection was enacted. See, *e.g.*, 18 U.S.C. 982(a)(2), (3), (4), (5), (6)(A)(ii)(I) and (7); 18 U.S.C. 982(a)(8)(B) (2000 & Supp. IV 2004).[2] Thus, the "gross

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because "[a] person committing a fraud on a financial institution has no right to recover the money he invested in the fraud scheme; nor does a drug dealer have any right to recover his overhead expenses when ordered to forfeit the proceeds of drug trafficking." H.R. Rep. No. 358, 105th Cong., 1st Sess. Pt. 1, at 48 (1997) (discussing the precursor to the provision that amended Section 981(a)(2)).

[2] As originally enacted, the criminal forfeiture statute applied only to money laundering offenses under 18 U.S.C. 1956 and 1957, and it used only the term "gross receipts." See Money Laundering Control Act of 1986, Pub. L. No. 99-570, § 1366(a), 100 Stat. 3207-35. The reference to "gross receipts" was eliminated two years later. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6463(c), 102 Stat. 4374 (now codified at 18 U.S.C. 982(a)(1) (Supp. IV 2004)). Congress added provisions referring to the "proceeds" of other violations in 1989, see Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 963(c)(1)(B), 103 Stat. 504-505 (18 U.S.C. 982(a)(2)), but returned to the formulation "gross receipts" when it added additional provisions one year later, see Crime Control Act of 1990, Pub. L. No. 101-647, § 2525(b), 104 Stat. 4874-4875 (18 U.S.C. 982(a)(3) and (4)). Congress used the term "gross proceeds" for the first time in 1992, see Anti Car Theft Act of 1992, Pub. L. No. 102-519, § 104(b), 106 Stat. 3385 (18 U.S.C. 982(a)(5)), and then again in 1996, see Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 249(a), 110 Stat. 2020 (18 U.S.C. 982(a)(7)). In a separate enactment later in 1996, Congress returned to the term "proceeds," see Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 217, 110 Stat. 3009-573 (18 U.S.C. 982(a)(6)), but, most recently, in 1998, again used the term "gross proceeds," see Telemarketing Fraud Prevention Act of 1998, Pub. L. No. 105-184, § 2(1)(B), 112 Stat. 520 (now codified at 18 U.S.C. 982(a)(8) (Supp. IV 2004)). Nothing in the legislative history of any of the enact-

receipts" definition is consistent with both the ordinary meaning of "proceeds" and Congress's use of the term in related contexts.

3. The Seventh Circuit reasoned that, if Congress had intended the "gross receipts" meaning, it would have used that term instead of "proceeds." *United States* v. *Scialabba*, 282 F.3d 475, 477, cert. denied, 537 U.S. 1071 (2002). Respondent Diaz makes the same argument, citing as support the fact that Congress has used the terms "gross revenue" and "gross receipts" in other criminal statutes. See Diaz Br. in Opp. 12. That argument is incorrect.

Because the primary and ordinary meaning of "proceeds" is "gross receipts," Congress would have expected courts to give the term that meaning, whether or not Congress had used different terms with the same meaning, such as "gross receipts" and "gross revenues," in other statutes. As this Court has recognized, Congress sometimes uses different words in different statutes even though it intends those words to have the same meaning. See *Limtiaco* v. *Camacho*, 127 S. Ct. 1413, 1419 (2007) (holding that "tax valuation" in 48 U.S.C. 1423a means "assessed valuation" even though Congress used "assessed valuation" in another statute); *Deal* v. *United States*, 508 U.S. 129, 134 (1993) ("No one can disagree * * * that 'Congress sometimes uses slightly different language to convey the same message.'"). Congress's failure to rely uniformly on one of two synonyms hardly empowers courts to ignore a word's primary and ordinary meaning.

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ments indicates that Congress attached any significance to the changes in phraseology. And nothing about the nature of the predicate offenses suggests any reason why Congress would have wanted the scope of forfeiture to vary for the different offenses.

Moreover, respondent's argument proves too much. The logic behind the argument dictates that "proceeds" also cannot mean "profits," as the Seventh Circuit has held, because Congress has likewise used that term in other criminal statutes. *E.g.*, 18 U.S.C. 2318(f)(2)(C)(i) and (3)(A)(ii) (Supp. IV 2004); 18 U.S.C. 2520(c)(2)(A); see *United States* v. *Grasso*, 381 F.3d 160, 167 (3d Cir. 2004) (noting that Congress "might just as readily have used the term 'profits'"), vacated and remanded on other grounds, 544 U.S. 945 (2005), reinstated in relevant part, No. 03-1441 (3d Cir. May 20, 2005).

Indeed, to the extent that Congress's choice of words in the money laundering statute creates any negative inference, the inference is that Congress did not mean "profits." Because the primary meaning of "proceeds" is "gross receipts," Congress presumably would have qualified the term "proceeds" with the modifier "net" (or used the alternative term "profits") if it had intended to limit the statute's coverage to that subcategory of proceeds. See *BP Am. Prod. Co.*, 127 S. Ct. at 644-645 (suggesting that the absence of the modifier "administrative" indicates that Congress intended the primary meaning of "action"—judicial proceeding—rather than the secondary meaning, which includes an administrative proceeding).

B. The "Gross Receipts" Definition Gives The Money Laundering Statute Its Proper Scope, While The "Profits" Definition Would Unnaturally Constrict The Statute

1. The "gross receipts" definition of "proceeds" gives the money laundering statute its appropriate scope. The gross receipts of a crime accurately reflect the scale of the criminal activity, because the illegal activity generated all of the funds. And all of the gross

receipts of the crime can be used to promote further crime. For example, a drug dealer can use the money that he is paid for a drug sale to purchase new drugs for distribution whether or not the first sale was made at a profit. Moreover, the gross receipts of a criminal enterprise represent the amount of unexplained cash that could lead to detection, and thus concealing any of the gross receipts can impede detection and prosecution of the crime. A drug dealer who launders the proceeds of a loss-leading sale by funneling them through a legitimate business conceals his drug trafficking just as effectively as a dealer who launders the proceeds of a profitable deal. In either case, the drug-dealing business generates cash that is not associated with any legitimate business and could give rise to suspicions, and the laundering transaction conceals that cash and helps conceal the crime. Construing "proceeds" to mean "gross receipts" thus advances the policies underlying the money laundering statute, which seeks to prevent criminals from using the fruits of their crimes to conceal or to further their illegal activities. See *United States* v. *Iacaboni*, 363 F.3d 1, 5-6 (1st Cir.), cert. denied, 543 U.S. 978 (2004).

2. In contrast, the "profits" definition of "proceeds" would constrict the money laundering statute in significant ways that Congress could not have intended. As both the district court and the court of appeals recognized, the "profits" definition would categorically preclude money laundering prosecutions based on the use of receipts of underlying crime to pay the expenses incurred in committing that crime. See Pet. App. 12a, 49a, 77a-78a. That limitation follows from the "profits" definition because funds used to pay the expenses of a crime are, by definition, not the net income or profits of that

crime. See *id.* at 49a, 77a-78a. But there is no justification for that limitation on the scope of the money laundering statute, which expressly covers transactions designed to promote unlawful activity. The payment of the expenses of a crime commonly promotes the continuation and expansion of the criminal enterprise.

This case illustrates the point. As the Seventh Circuit held at an earlier stage of the case, the payments to the bolita's runners, collectors, and winners promoted the prosperity and growth of the illegal gambling operation. *United States* v. *Febus*, 218 F.3d 784, 790 (describing how those payments enabled the bolita to grow from approximately $250,000 in annual revenue in 1989 to approximately $410,000 in annual revenue in 2004), cert. denied, 531 U.S. 1021 (2000). See *Iacaboni*, 363 F.3d at 5 ("[n]othing makes an illegal gambling operation flourish more than the prompt payment of winners") (brackets in original; citation omitted). Because paying the expenses of illegal businesses enables them to continue and to expand (and distributes cash that otherwise could lead to detection), prosecutions based on expense payments have long comprised a substantial portion of the cases brought under the promotion subsection of the money laundering statute.[3] By fore-

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[3] See, *e.g.*, *United States* v. *Thorn*, 446 F.3d 378, 392 (2d Cir. 2006) (proceeds of illegal business used for operating expenses necessary for business to "continue and expand"); *United States* v. *Angelos*, 433 F.3d 738, 748 (10th Cir.) (use of proceeds of marijuana distribution business to pay rent on stash house), cert. denied, 127 S. Ct. 723 (2006); *United States* v. *Alerre*, 430 F.3d 681, 695 (4th Cir. 2005) (distribution of funds obtained from unlawful prescription drug sales and health care fraud to compensate physicians, employees, and owners), cert. denied, 126 S. Ct. 1925 (2006); *United States* v. *Lawrence*, 405 F.3d 888, 901 (10th Cir.) (use of proceeds of Medicare fraud to pay doctor whose participation was essential to the scheme), cert. denied, 126 S. Ct. 468 (2005); *United*

closing prosecution of those cases, the "profits" rule would dramatically curtail the scope of the promotion component of the statute as it has traditionally been understood.

The definition of "proceeds" adopted by the Seventh Circuit would also curtail prosecutions under the money laundering statute in another significant way. Under that definition, the government could not prosecute de-

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States v. *Caplinger*, 339 F.3d 226, 233 (4th Cir. 2003) (use of fraudulently obtained funds to purchase supplies, make repairs to corporate plane, and pay rent and salaries); *United States* v. *Bolden*, 325 F.3d 471, 489 (4th Cir. 2003) (use of fraudulently obtained funds to compensate accomplice, "encouraging his continued participation"); *United States* v. *Johnson*, 297 F.3d 845, 868 (9th Cir. 2002) (use of proceeds of telemarketing fraud to "fund the operation"), cert. denied, 537 U.S. 1242 and 538 U.S. 955 (2003); *United States* v. *Evans*, 272 F.3d 1069, 1082 (8th Cir. 2001) (prostitute's payments to escort agency from proceeds of prostitution), cert. denied, 535 U.S. 1029, 535 U.S. 1072, 535 U.S. 1087 and 537 U.S. 857 (2002); *United States* v. *Wyly*, 193 F.3d 289, 295-296 (5th Cir. 1999) (kickback to public official for his participation in fraud scheme); *United States* v. *Rudisill*, 187 F.3d 1260, 1267 (11th Cir. 1999) (use of proceeds from illegal telemarketing scheme to cover payroll expenses of scheme); *United States* v. *Reed*, 167 F.3d 984, 993 (6th Cir.) (drug proceeds used to pay antecedent drug debt), cert. denied, 528 U.S. 897 (1999); *United States* v. *King*, 169 F.3d 1035, 1039 (6th Cir.) (use of drug proceeds to pay drug couriers for drugs delivered on consignment), cert. denied, 528 U.S. 892 (1999); *United States* v. *France*, 164 F.3d 203, 208-209 (4th Cir. 1998) (drug proceeds used to post bail for confederate in scheme), cert. denied, 527 U.S. 1010 (1999); *United States* v. *Hildebrand*, 152 F.3d 756, 762 (8th Cir.) (use of proceeds of fraud to pay for office supplies, secretarial services, and staff wages in furtherance of scheme), cert. denied, 525 U.S. 1033 (1998); *United States* v. *Coscarelli*, 105 F.3d 984, 990 (5th Cir.) (proceeds of telemarketing fraud used to pay co-conspirators and overhead), vacated, 111 F.3d 376 (5th Cir. 1997), reinstated, 149 F.3d 342 (5th Cir. 1998) (en banc); *United States* v. *Marbella*, 73 F.3d 1508, 1514 (9th Cir.) (use of proceeds from fraudulent scheme to compensate individuals for referring victims), cert. denied, 518 U.S. 1020 (1996).

fendants for money laundering connected to an illegal activity unless the government could prove that the illegal activity made a profit. As a result, a criminal who laundered his ill-gotten funds as they came in would not be guilty of money laundering until he turned a profit, and an inept criminal who never managed to earn a profit would never be guilty of money laundering at all. See *McHan*, 101 F.3d at 1042 (defining "proceeds" as "profits" "would be rewarding unsuccessful drug dealers"). But it makes little sense to give a money laundering defense to drug dealers, gambling enterprise operators, and racketeers whose expenses over a period of time happen to exceed their revenue. As illustrated by this case, criminals can use the gross receipts of their crimes to expand their illegal activities or to promote other illegal activities in the very same way that they can use profits to facilitate further crime.[4]

3. The unwarranted limitations on money laundering prosecutions imposed by the court of appeals' rule would also apply to the concealment component of the statute. Like the promotion subsection, the concealment subsection is violated only if a financial transaction involves the "proceeds" of specified unlawful activity. See 18 U.S.C. 1956(a)(1)(B)(i). The term "proceeds" that the court of appeals construed in *Scialabba* and this case appears in the introductory language of Section 1956(a)(1), which applies to both subsections. And the court in this case

[4] As a practical matter, it may be that few individuals will run the risk of criminal sanctions to pursue an illegal enterprise that is not profitable. Even so, it will be easy for defendants to assert an absence of profits and difficult for the government to prove profitability. See pp. 27-29, *infra*. And, even in the rare case, when an enterprise runs at a loss for some period of time, use of the proceeds still promotes the enterprise and concealing the gross receipts still assists the enterprise to expand.

described *Scialabba* as "holding that the term 'proceeds' in *§ 1956(a)(1)* means net income." Pet. App. 15a-16a (emphasis added). Thus, the court's "profits" requirement would logically also apply in concealment cases.[5]

The "profits" requirement makes no more sense in concealment cases than in promotion cases. The purpose of prohibiting financial transactions designed to conceal the proceeds of criminal activity is to facilitate crime detection and prosecution. See, *e.g.*, *United States* v. *Castellini*, 392 F.3d 35, 49 (1st Cir. 2004); *Iacaboni*, 363 F.3d at 5-6. As discussed above, large amounts of unexplained cash create a risk of detection whether or not the enterprise is profitable, and concealing the gross receipts of criminal activity therefore can impede its detection and prosecution just as effectively as concealing its profits. Thus, the purpose of the statute squarely

[5] The "profits" definition would presumably also apply to other money laundering provisions that contain the term "proceeds." See, *e.g.*, 18 U.S.C. 1956(a)(1)(A)(ii) (criminalizing transactions involving the "proceeds" of specified unlawful activity undertaken with the intent to evade taxes); 18 U.S.C. 1956(a)(1)(B)(ii) (criminalizing transactions involving the "proceeds" of specified unlawful activity undertaken with the intent to evade currency reporting requirements); 18 U.S.C. 1956(a)(2) (criminalizing the transfer of funds between the United States and a foreign country with knowledge that the funds are the "proceeds" of unlawful activity and that the transfer is designed to conceal the "proceeds" or to avoid a transaction reporting requirement); 18 U.S.C. 1956(a)(3) (criminalizing a financial transaction involving property represented by another, at the direction of a federal official, to be the "proceeds" of specified unlawful activity, with the intent to promote specified criminal activity, to conceal the "proceeds," or to avoid a transaction reporting requirement); 18 U.S.C. 1956(h) (criminalizing conspiracy to commit any substantive violation of Section 1956); and 18 U.S.C. 1957 (criminalizing financial transactions in "criminally derived property" of a value greater than $10,000 and defining "criminally derived property" to include the "proceeds" of, or property derived from the "proceeds" of, a criminal offense).

applies to a transaction designed to conceal ill-gotten funds that will be used to pay the expenses of the revenue-generating crime. Yet the "profits" definition of "proceeds" would foreclose that kind of prosecution, just as it would foreclose prosecutions based on expense payments under the promotion subsection of the statute.

Nor is there any reason to give criminals a defense to concealment prosecutions because their crimes were not profitable. A criminal whose operation has yet to turn a profit has just as great a need—and no more of an entitlement—to avoid detection by laundering his ill-gotten funds. Moreover, the detection and prosecution of a crime is no less important because the crime is not yet or may never be profitable. For example, a profitable bank robbery may be accomplished without violence, while an unprofitable one may involve the murder of a bank guard or a customer. It would make little sense to preclude a concealment prosecution simply because the more violent robbers were prevented from stealing more than the amount needed to cover their expenses. Limiting the scope of the money laundering statute by adoption of the court of appeals' "profits" rule would thus undermine the statute's purposes.

C. The "Profits" Definition Would Impose Unreasonable Burdens On The Government And The Courts

The "profits" definition of "proceeds" would also create serious obstacles to effective enforcement of the money laundering statute in those cases that it did not outright preclude. The government would be required, in every money laundering case, to prove that the predicate criminal activity was profitable and that the alleged money launderer knew that the funds that he was laundering were profits. That would be an unreasonable

burden in light of "the extreme difficulty in th[e] conspiratorial, criminal area of finding hard evidence of net profits." S. Rep. No. 225, *supra*, at 199 n.24 (quoting *Jeffers*, 532 F.2d at 1117). Moreover, the "profits" definition would encumber the courts with complicated questions about what accounting principles should apply to criminal enterprises. Thus, as even the Seventh Circuit recognized, the "profits" rule would complicate both the government's efforts to prosecute money laundering violations and the courts' task of resolving money laundering prosecutions. Pet. App. 13a.

1. The difficulties of proof confronting the government under the "profits" definition would be substantial. Unlike legitimate businesses, which keep accounting records for tax and financial reporting purposes, criminal enterprises do not ordinarily keep such records. See Pet. App. 13a; *Grasso*, 381 F.3d at 169 n.13. When criminals do keep records, they are unlikely to be accurate and complete, and they may even be recorded in code and thus impossible to interpret. See, *e.g.*, *Stinnett* v. *Iron Works Gym/Executive Health Spa, Inc.*, 301 F.3d 610, 612 (7th Cir. 2002); *United States* v. *Smith*, 31 F.3d 1294, 1299 (4th Cir. 1994), cert. denied, 513 U.S. 1181 (1995). To the extent that criminals keep decipherable records, they have an incentive to falsify those records or to keep two sets of accounts. By doing so, they may disguise the financial success of their operations and reduce their sentencing and forfeiture exposure. A "profits" definition of "proceeds" would provide criminals with even more reasons to manipulate their books. See *McHan*, 101 F.3d at 1042 (defining "proceeds" as "profits" would "create perverse incentives for criminals to employ complicated accounting measures to shelter the profits of their illegal enterprises"). The lack of reli-

able records would make it difficult for the government to prove that the criminal activity underlying a money laundering prosecution was profitable.

The burdens on the government would extend beyond the difficulty in finding reliable financial records. The money laundering statute requires not only that the money laundering transaction "involve[] the proceeds of specified unlawful activity" but also that the alleged money launderer "know[] that the property involved in [the] financial transaction represents the proceeds of some form of unlawful activity." 18 U.S.C. 1956(a)(1). Therefore, the "profits" definition would require the government to prove that the defendant knew that the underlying crime was profitable. Proving that knowledge would be challenging in many cases and particularly difficult when the money launderer did not participate in the underlying crime. A "profits" definition would thus pose an especially great impediment to prosecutions of professional money launderers—situations in which money laundering charges may be the only ones available.

2. The "profits" definition would also impose substantial burdens on the courts. The terms "profits" and "net income" have concrete meaning only after the application of a system of accounting principles. But there are no generally accepted accounting principles for criminal enterprises. Therefore, application of a "profits" approach would require the courts to formulate an accounting theory for illegal businesses. That would be a burdensome task, necessitating the resolution of a host of difficult and novel questions.

The difficulties that would arise are illustrated by the following hypothetical: The government brings a money laundering prosecution against a defendant who, over a

period of years, robbed banks and used the loot to buy drugs for distribution. Under the "profits" approach, a court resolving that case would first have to choose the relevant activity for purposes of assessing profitability. In other words, the court would have to decide whether to evaluate the profitability of each individual bank robbery, the overall bank robbery operation, or the entire criminal enterprise, including both the bank robbery and the drug trafficking components. Next, the court would have to determine the relevant accounting period. It would need to decide whether profits should be measured on annual basis, a quarterly basis, or over some other period, such as the entire course of criminal conduct.

If the court decided to measure profits using an annual or other recurring period, the court would also have to choose a method for determining when to recognize income and expenses. Possible options would include the cash method of accounting, the accrual method, or some combination of the two. Under the cash method, income is generally recognized when cash is received, and expenses are generally recognized when cash is paid out. See Stephen F. Gertzman, *Federal Tax Accounting* ¶ 3.01, at 3-2 to 3-3 (2d ed. 1993) (Gertzman). The accrual method, in contrast, generally "attempts to record the financial effects on an enterprise of transactions and other events and circumstances that have cash consequences for [the] enterprise in the periods in which the transactions, events, and circumstances occur rather than only in the periods in which cash is received or paid by the enterprise." Financial Accounting Standards Board (FASB), *Statement of Financial Accounting Concepts No. 1* para. 44 (Nov. 1978) <http://www.fasb.org/pdf/con1.pdf>. Because the choice of account-

ing method affects when income and expenses are recognized, that choice—like the choice of the relevant activity and the accounting period—could have a significant impact on whether the criminal enterprise was determined to be profitable.

After the court resolved those issues, it would face the additional task of determining what qualifies as income and what qualifies as an expense of the predicate criminal activity. For example, if the defendant stole a getaway car before each bank robbery and sold the car to a "chop shop" after each robbery, would the proceeds of those sales count as income from the bank robbery operation? Similarly, if, during one robbery, the defendant noticed that a bank customer was wearing a beautiful ring, and the defendant stole the ring for his girlfriend, would the value of the ring count as income from the bank robbery? As for expenses, could the defendant deduct the value of his time as a "salary" that reduced his profits? And, if the defendant's accomplices received a percentage of the take from each robbery, rather than a fixed salary, would their compensation be profits rather than an expense? Would the expenses associated with an aborted bank robbery be deductible? And, if the defendant paid bribes to corrupt police officers for protection of his unlawful activities, would the bribes be allowed as expenses?

Still more complications could arise because, as the court of appeals acknowledged, "the line between the payment of expenses and reinvestment of net income is, generally speaking, murky." Pet. App. 13a. Distinguishing between the two would be especially difficult when the predicate offense involved continuing criminal activity, such as a drug conspiracy. Under the "profits" rule, if the predicate offense was a discrete drug sale for

which the drug dealer's supplier had provided the drugs on credit, the government apparently could not prosecute as money laundering the use of the proceeds of the sale to pay the supplier, because that transaction would involve the payment of an expense. See *id.* at 12a.[6] The government could, however, prosecute as money laundering the use of the net income from the sale to buy additional drugs for future distribution. That transaction would involve the reinvestment of profits to promote illegal activity, which would qualify as money laundering even under the "profits" rule. See *ibid.* If the predicate offense was a drug conspiracy, however, the purchase of new drugs using the net income from the sale would entail both the payment of an expense of the conspiracy and, if the overall conspiracy was profitable, a reinvestment of its profits. Yet a court would have to categorize the transaction as one or the other. If the transaction were deemed an expense payment, it could not support a money laundering prosecution. But if it were deemed the reinvestment of profits, it could. The court of appeals provided no guidance on how a court should resolve that conundrum.

3. Respondent Diaz argues that the lack of accounting principles for illegal businesses is not a problem because courts can use the accounting rules applicable to legitimate businesses. See Diaz Br. in Opp. 8. That is incorrect.

Legitimate businesses are required by various statutes and regulations to follow particular accounting methods for tax and financial reporting purposes. *E.g.*,

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[6] However, a money laundering prosecution might be permissible if courts applied tax accounting rules, which do not allow deductions for amounts paid in carrying out a drug trafficking business. See p. 34, *infra* (citing 26 U.S.C. 280E).

26 U.S.C. 441-448 (2000 & Supp. IV 2004); 15 U.S.C. 77s(b), 7218 (Supp. IV 2004); 17 C.F.R. 210.4-01(a)(1). But, even when criminals keep financial records, those records are not likely to comply with the accounting methods required for legal businesses. See *Grasso*, 381 F.3d at 169 n.13.

In addition, there is no one, uniform set of accounting principles that applies in all contexts, even for lawful businesses. To begin with, the rules governing financial accounting frequently differ from those governing tax accounting. See Durwood L. Alkire, *Tax Accounting* § 2.02[1][c] at 2-8 (LexisNexis 2006) (Alkire); *id.* § 2.02[3][c] at 2-16 to 2-22. As this Court has observed, financial accounting and tax accounting have "vastly different objectives," and those different objectives are "mirrored in numerous differences of treatment." *Thor Power Tool Co.* v. *Commissioner*, 439 U.S. 522, 542-543 (1979). For example, individuals and unincorporated business generally may use the cash method of accounting, rather than the accrual method, in calculating their taxable income. See 26 U.S.C. 446. In contrast, the cash method is not widely used for financial reporting because generally accepted accounting principles (GAAP) require use of the accrual method. See Gertzman ¶ 3.01[1], at 3-3; FASB, *Statement of Financial Accounting Concepts No. 6* para. 134 (Dec. 1985) <http://www.fasb.org/pdf/ con6.pdf>. Even when taxpayers use the accrual method, accrual accounting for tax purposes differs significantly from accrual accounting for financial reporting purposes. See Gertzman ¶ 4.01[2], at 4-3. Tax and financial accounting also diverge in the treatment of illegal payments, such as bribes. Those payments are not deductible as expenses for tax purposes, see, *e.g.*, 26 U.S.C. 162(c), but they are treated as expenses for fi-

nancial reporting, see Alkire § 2.02[3][iv], at 2-22. See also 26 U.S.C. 280E (expenses of carrying on a drug trafficking business are not deductible for tax purposes). Thus, in the money laundering context, the choice between tax and financial accounting could have significant consequences for whether an illegal business was determined to be profitable under a "profits" definition of "proceeds."

Nor would it be a solution for this Court to require all courts considering money laundering cases to use, for example, GAAP to determine profitability. Most businesses are not required to keep their books according to GAAP. See Robert N. Anthony et al., *Accounting: Text and Cases* 11 (12th ed. 2007). Many businesses do not do so; for instance, smaller businesses sometimes keep their books using the cash method (which is not permitted by GAAP). See Gertzman ¶ 3.01[2], at 3-3 to 3-4. Moreover, this Court has recognized that GAAP "are far from being a canonical set of rules that will ensure identical accounting treatment of identical transactions. [GAAP], rather, tolerate a range of 'reasonable' treatments, leaving the choice among alternatives to management." *Thor Power Tool Co.*, 439 U.S. at 544 (footnote omitted).

Courts would also face the intractable problem of defining the time period for determining profitability. Both tax and financial accounting require the determination of income and expenses based on fixed and regularly recurring periods. See *Burnet* v. *Sanford & Brooks Co.*, 282 U.S. 359, 365 (1931); FASB, *Statement of Financial Accounting Concepts No. 1* para. 42. But periodic determination of income and expenses would not make sense for calculating profits under the money laundering statute. If profits were calculated on a peri-

odic basis, income from the same course of criminal conduct could be excluded from the profitability calculation merely because it fell outside some arbitrarily selected time period. For example, if profits were calculated on an annual basis, a criminal would be able to avoid a money laundering charge because his illicit business had a slightly unprofitable year, even though prior years were extremely profitable. That result would undermine the purposes of the money laundering statute, because the criminal would be able to conceal his receipts from the unprofitable year or to reinvest them in his illegal business without fear of prosecution for money laundering.

Thus, the "profits" definition of "proceeds" would embroil the courts in numerous accounting disputes. Because there is no clear body of authority to resolve those issues, money laundering trials would likely turn into a battle of accounting experts. They would become arduous, expensive, and confusing for all concerned. Although Congress could have provided guidance on how to resolve those difficulties, it did not. Cf. note 1, *supra* (noting that, in the two narrow circumstances in the civil forfeiture area in which Congress deviated from the "gross receipts" approach, it specified the deductible expenses and placed the burden of proof on the party seeking a deduction). Congress's silence surely reflects not a gross omission but rather an intent to use proceeds in its ordinary "gross receipts" sense, which obviates the need for accounting rules.

D. The Court Of Appeals' Justifications For The "Profits" Definition Are Not Persuasive

The court of appeals offered two principal justifications for its "profits" definition of "proceeds." The

court stated that the "profits" definition "avoid[s] 'convict[ing] a person of multiple offenses when the transactions that violate one statute necessarily violate another.'" Pet. App. 7a-8a (second brackets in original) (quoting *Scialabba*, 282 F.3d at 477). The court also reasoned that the "profits" definition is required by the rule of lenity. *Id.* at 7a (citing *Scialabba*, 282 F.3d at 477). Neither of those purported justifications withstands scrutiny.

1. A "profits" definition is not necessary to avoid multiple punishments for a single offense. Other elements of the money laundering statute ensure that the money laundering offense and the underlying crime remain distinct.

a. The money laundering statute is not violated unless there is a financial transaction that "involves the proceeds" of the underlying crime. 18 U.S.C. 1956(a)(1). That statutory requirement ensures a separation between the conduct that constitutes the predicate crime and the conduct that constitutes money laundering. As the courts of appeals have held, the requirement means that the "predicate crime must have produced proceeds in acts distinct from the conduct that constitutes money laundering." *United States* v. *Mankarious*, 151 F.3d 694, 705 (7th Cir.), cert. denied, 525 U.S. 1056 (1998); see *ibid.* (the money laundering statute "criminalizes a transaction in proceeds, not the transaction that creates the proceeds"); see also *United States* v. *Awada*, 425 F.3d 522, 524 (8th Cir. 2005) (the "underlying activity must be separate from the actual laundering"); *United States* v. *Butler*, 211 F.3d 826, 830 (4th Cir. 2000) ("the laundering of funds cannot occur in the same transaction through which those funds first become tainted by crime"), cert. denied, 531 U.S. 1149 (2001); *United*

States v. *Christo*, 129 F.3d 578, 580 (11th Cir. 1997) (the money laundering statute requires "a monetary transaction that was separate from and in addition to the underlying criminal activity").

The requirement that there be a distinct transaction using proceeds generated by the underlying offense prevents money laundering prosecutions for the same conduct that constitutes that offense. For example, robbing a bank or selling illegal drugs cannot simultaneously be prosecuted as a predicate offense and as money laundering, because there are no proceeds until the bank has been robbed or the drugs have been sold. See *United States* v. *Heaps*, 39 F.3d 479, 485 (4th Cir. 1994). The requirement of a distinct transaction using proceeds generated by the underlying crime does not, however, generally pose any impediment to money laundering prosecutions based on the payment of the expenses or the reinvestment of the fruits of that crime. For example, when a bank robber uses the loot from a robbery to pay his accomplices, the payments are distinct from the conduct constituting the robbery. Likewise, when a drug trafficker uses the proceeds from a drug sale to buy a stash house for his enterprise, the house purchase and the drug sale constitute distinct transactions. In neither instance would prosecuting the offender for both the predicate offense and the money laundering transaction subject him to multiple punishment for the same conduct.

b. The courts of appeals sometimes describe the distinctness requirement as mandating that the money laundering transaction "*follow* and * * * be separate from any transaction necessary for the predicate offense to generate proceeds." *Mankarious*, 151 F.3d at 706 (emphasis added); see *United States* v. *Johnson*, 971

F.2d 562, 569 (10th Cir. 1992) ("Congress targeted only those transactions occurring after proceeds have been obtained from the underlying unlawful activity."). As those courts have clarified, however, the money laundering statute imposes a temporal requirement only in the sense that the predicate offense must first generate proceeds before those proceeds can be laundered. *Mankarious*, 151 F.3d at 706. But, as long as proceeds have been generated, "it does not matter when all the acts constituting the predicate offense take place." *Ibid.* Thus, proceeds may be derived either "from an already completed offense" or from "a completed phase of an ongoing offense." *United States* v. *Conley*, 37 F.3d 970, 980 (3d Cir. 1994); see B. Frederic Williams, Jr. & Frank D. Whitney, *Federal Money Laundering: Crimes and Forfeitures* § 9.2.4, at 104 n.201.9 (LexisNexis 2004 Supp.) (citing cases).

When the predicate crime is committed over a period of time, it can sometimes create proceeds, and those proceeds can be laundered, before the predicate crime is complete. For example, a mail fraud scheme may yield fraudulently obtained funds before any mailing takes place. If those funds are concealed or reinvested in the scheme in transactions that are not essential elements of the mail fraud offense, then those transactions may properly be prosecuted as money laundering. Thus, in *Mankarious*, the court of appeals upheld money laundering convictions arising out of a mail fraud scheme in which payments based on hand-delivered false invoices generated proceeds before confirmatory copies of the invoices were mailed. The money laundering occurred when, before the mailings, kickback checks derived from those payments were negotiated by cashing them through an intermediary or depositing them into third-

party bank accounts. See 151 F.3d at 696-698, 703-707. Of course, if the negotiation of the kickback checks had been an essential element of the underlying mail fraud offense, then the requirement of a distinct money laundering transaction would not have been satisfied, and there could not have been a money laundering prosecution. But an inquiry into whether the proceeds generated by the fraud were profits rather than gross receipts of the crime was not necessary to ensure a separation between the predicate offense and the money laundering.

Indeed, requiring a distinct transaction using proceeds provides even greater protection against multiple prosecutions for the same conduct than this Court generally demands. Traditionally, the Court has used the analysis in *Blockburger* v. *United States*, 284 U.S. 299 (1932), to determine whether Congress intended that a person be subject to punishment under multiple statutes for a single course of conduct. See *Rutledge* v. *United States*, 517 U.S. 292, 297 (1996). The *Blockburger* test examines the elements of the two offenses to determine whether each offense requires proof of a fact that the other does not. See *ibid.* That test is satisfied in the case of money laundering and its specified predicate crimes. See, *e.g.*, *Iacaboni*, 363 F.3d at 6 & n.8 (upholding a money laundering prosecution based on payment of the expenses of an illegal gambling business); *Conley*, 37 F.3d at 978 (same). The elements of money laundering include not only that the defendant conduct a transaction with the proceeds of the predicate crime but also that the defendant intend either to conceal those proceeds or to use them to promote specified unlawful activity. Neither of those elements is required to establish that the defendant committed the predicate crime.

Thus, the money laundering offense requires proof of facts that the predicate crime does not. Similarly, in order to convict the defendant of the underlying crime, the government must prove a fact that is not required to obtain a money laundering conviction—the defendant's participation in the underlying crime. Although proof that *someone* committed the predicate offense is necessary to establish money laundering, the government need not prove that the money laundering defendant committed that crime or even had anything to do with it.

c. This case illustrates that the "profits" definition is not necessary to ensure a distinction between the money laundering offense and the predicate crime. The predicate offense for respondents' money laundering convictions is conducting an illegal gambling business in violation of 18 U.S.C. 1955. See Indictment counts 3-4. The business operated by having bettors place wagers with runners, who took a commission from the receipts and delivered the remaining money to collectors. The collectors (including respondent Diaz) took their own salary out of those funds and delivered the rest to respondent Santos, who oversaw the operation and paid the winners. Pet. App. 2a, 19a. The gambling business was a continuing offense that generated proceeds each time that a bettor placed a wager. The commissions and salaries received by the runners and collectors were distinct transactions made with those previously generated proceeds, just like a bank robber's payments to his accomplices. Similarly, the payments to winners were distinct transactions that were also made with the previously generated proceeds of the gambling operation. The payments to the couriers and winners thus followed and were distinct from the predicate-offense conduct that generated the proceeds.

Respondents argue that the gambling and money laundering offenses were not distinct because the payments to employees and winners were constituent or integral parts of the underlying gambling offense. See Santos Br. in Opp. 6; Diaz Br. in Opp. 13. But those payments were not elements of the underlying offense. Conducting an illegal gambling business under Section 1955 entails three elements: the business must violate the law of the State in which it is conducted; it must involve five or more persons; and it must remain in substantially continuous operation for more than 30 days or have gross revenue of at least $2000 in any given day. 18 U.S.C. 1955(b)(1). Proof that payments were made to employees or to winners is not required to establish a violation. Nor is proof of those payments required to establish a violation of the Indiana gambling statutes on which the Section 1955 offense was predicated. Those statutes include Indiana Code § 35-45-5-3(a)(6) (LexisNexis 2006 Supp.), which makes it a crime to "accept[] * * * for profit, money * * * risked in gambling," and Indiana Code § 35-45-5-3(a)(4), which makes it a crime to "sell chances" in "lotteries." See Indictment count 2. Under the plain language of those provisions, a gambling offense in Indiana is complete at the time the wager is placed. Subsequent payments to employees or winners are not elements of the offense. If the law were otherwise, a defendant could avoid violating the statute, while enjoying the profits from his gambling operation, by fraudulently refusing to pay employees and successful bettors.[7] Thus, as this case illus-

[7] Respondents also incorrectly suggest (Santos Br. in Opp. 10; Diaz Br. in Opp. 13) that the compensation of the bolita's employees did not involve transactions distinct from the underlying gambling offense because the employees deducted their compensation from the money

trates, the "profits" definition is unnecessary to preserve a distinction between money laundering and the predicate crime.

2. The court of appeals also erred in concluding that the "profits" definition of "proceeds" is required by the rule of lenity. See Pet. App. 7a; *Scialabba*, 282 F.3d at 477. The rule of lenity "comes into operation" only "at the end of the process of construing what Congress has expressed." *Callahan* v. *United States*, 364 U.S. 587, 596 (1961). Moreover, the rule applies only if "there is a grievous ambiguity or uncertainty in the statute." *Muscarello*, 524 U.S. at 139 (internal quotation marks and citation omitted). Thus, neither "[t]he mere possibility of articulating a narrower construction," *Smith* v. *United States*, 508 U.S. 223, 239 (1993), nor the "existence of some statutory ambiguity" is "sufficient to warrant application of [the] rule," *Muscarello*, 524 U.S. at 138. Instead, the rule applies "only if, after seizing everything from which aid can be derived, [the Court] can make no more than a guess as to what Congress intended." *Ibid.* (internal quotation marks and citation omitted).

The rule of lenity has no application in this case. Construing "proceeds" to mean "gross receipts" reflects the word's most common meaning and the meaning that Congress gave the same term in related statutes. Moreover, the "gross receipts" definition affords the money

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they collected before turning it over to Santos, instead of being paid by Santos after giving him the money. It makes no difference for purposes of the money laundering statute which method of payment Santos employed. Each employee's removal of his salary from the gross amount he collected (as previously arranged with Santos) was a financial transaction involving proceeds, and that transaction was separate from the underlying gambling offense.

laundering statute its proper scope and facilitates effective enforcement of the statute. In contrast, construing "proceeds" to mean "profits" would be contrary to its primary meaning and the meaning Congress has given the term in related contexts. That construction would unnaturally truncate the scope of the money laundering statute, render it exceedingly difficult to enforce in many cases, and seriously complicate money laundering trials—all without furthering any conceivable congressional objective. Congress's use of the term "proceeds" thus does not create any ambiguity, much less an ambiguity so serious that the Court can only guess at the term's intended meaning. "Proceeds" means "gross receipts."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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STATUTORY APPENDIX

1. Section 1956 of Title 18, United States Code, provides in pertinent part:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—
>
> (A) (i) with the intent to promote the carrying on of specified unlawful activity; or
>
> (ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or
>
> (B) knowing that the transaction is designed in whole or in part—
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
>
> (ii) to avoid a transaction reporting requirement under State or Federal law,
>
> shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.
>
> * * * * *

(c) As used in this section—

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" including initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accourts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

* * * * *

(7) the term "specified unlawful activity" means—

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31;

* * * * *

2. Section 1961 of Title 18, United States Code (Supp. IV 2004), provides in pertinent part:

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related

activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1591 (relating to peonage, slavery, and trafficking in persons).,[1] section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in mone-

[1] So in original.

tary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), sections 175-178 (relating to biological weapons), sections 229-229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled

substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

* * * * *

3. Section 1955 of Title 18, United States Code, provides in pertinent part:

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

* * * * *

4. Indiana Code § 35-45-5-1 (LexisNexis 2006 Supp.) provides in pertinent part:

As used in this chapter:

"Gain" means the direct realization of winnings.

"Gambling" means risking money or other property for gain, contingent in whole or in part upon lot, chance, or the operation of a gambling device; but it does not include participating in:

(1) bona fide contests of skill, speed, strength, or endurance in which awards are made only to entrants or the owners of entries; or

(2) bona fide business transactions that are valid under the law of contracts.

"Gambling device" means:

(1) a mechanism by the operation of which a right to money or other property may be credited, in return for consideration, as the result of the operation of an element of chance;

(2) a mechanism that, when operated for a consideration, does not return the same value or property for the same consideration upon each operation;

(3) a mechanism, furniture, fixture, construction, or installation designed primarily for use in connection with professional gambling;

(4) a policy ticket or wheel; or

(5) a subassembly or essential part designed or intended for use in connection with such a device, mechanism, furniture, fixture, construction, or installation.

In the application of this definition, an immediate and unrecorded right to replay mechanically conferred on players of pinball machines and similar amusement devices is presumed to be without value.

* * * * *

"Profit" means a realized or unrealized benefit (other than a gain) and includes benefits from proprietorship or management and unequal advantage in a series of transactions.

* * * * *

5. Indiana Code § 35-45-5-3 (LexisNexis 2006 Supp.) provides in pertinent part:

(a) A person who knowingly or intentionally:

(1) engages in pool-selling;

(2) engages in bookmaking;

(3) maintains, in a place accessible to the public, slot machines, one-ball machines or variants thereof, pinball machines that award anything other than an immediate and unrecorded right of replay, roulette wheels, dice tables, or money or merchandise pushcards, punchboards, jars, or spindles;

(4) conducts lotteries or policy or numbers games or sells chances therein;

(5) conducts any banking or percentage games played with cards, dice, or counters, or accepts any fixed share of the stakes therein; or

(6) accepts, or offers to accept, for profit, money, or other property risked in gambling;

commits professional gambling, a Class D felony.

* * * * *

7

No. 06-1005

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA

Petitioner,

v.

EFRAIN SANTOS AND BENEDICTO DIAZ

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

The principal federal money laundering statute, 18 U.S.C. 1956(a)(1), makes it a crime to engage in financial transactions using the "proceeds" of specified unlawful activities with the intent to promote those activities or to conceal the proceeds. The question presented is whether "proceeds" means the gross receipts from the unlawful activities or only the profits, *i.e.*, the gross receipts less expenses.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files *amicus curiae* briefs on various issues in this Court and other courts and has filed *amicus curiae* briefs in previous suits related to 18 U.S.C. §1956. See *Whitfield* v. *United States*, 543 U.S. 209, 211 (2005) ("whether conviction for conspiracy to commit money laundering . . . requires proof of an overt act in furtherance of the conspiracy"); *United States* v. *Cabrales*, 524 U.S. 1, 3 (1998) (discussing the appropriate venue for trial of money-laundering offenses); see also *Cuellar* v. *United States*, 478 F.3d 282 (5th Cir. 2007), *petition for cert. filed*, No. 06-1456 (U.S. May 3, 2007).

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

STATEMENT OF THE CASE

Respondents Santos and Diaz were convicted for their roles in the operation of an illegal lottery in Indiana. The participants or gamblers in the lottery placed their bets with "runners" who took a percentage of the money as a commission and delivered the balance of the money and betting slips to "collectors." The collectors in turn provided the remainder of the money and the betting slips to Santos, and received a salary or commission for doing so from the money collected. Respondent Diaz was a collector in the operation. Pet. App. 2a, 19a.

In addition to being convicted under 18 U.S.C. § 1955 for his involvement in the illegal gambling operation, and under 18 U.S.C. § 371 for conspiracy to violate Section 1955, Santos also was convicted of money laundering under 18 U.S.C. § 1956(a)(1)(A)(i), and conspiracy to commit money laundering under 18 U.S.C. § 1956(h). Pet. App. 2a-3a. For his part, Diaz was convicted, after a guilty plea, of conspiracy to commit money laundering under 18 U.S.C. § 1956(h). *Id.* at 3a.

Section 1956 of the Act prohibits financial transactions using the "proceeds" of "specified unlawful activity . . . with the intent to promote the carrying on of specified unlawful activity." 18 U.S.C. § 1956(a)(a)(A)(i). With respect to Santos, the money laundering convictions were based upon Santos' payments to the lottery's collectors and winners. Diaz's conviction was based on his receipt of payment for his collection services. Pet. App. 6a. Thus, the money laundering convictions were premised on the theory that these payments were made and received with the intent and design to "promote the carrying on" of the illegal lottery.

As a result of his money laundering conviction, Santos was sentenced to 210 months in prison – nearly four times longer than the maximum five year sentence for committing the

underlying gambling offense. Pet App. 18a, 20a. Diaz received a shorter sentence on the basis of his guilty plea.

SUMMARY OF ARGUMENT

In the decision below, the United States Court of Appeals for the Seventh Circuit correctly interpreted the term "proceeds" in 18 U.S.C. § 1956(a)(1)(A)(i) to mean profits. This interpretation properly limits the scope of § 1956 consistent with Congress' intent in enacting the Money Laundering Control Act of 1986 (the "Act"), 18 U.S.C. §§ 1956-1957. The clear goal of the Act was to criminalize the process of giving ill-gotten gains the appearance of legitimacy through financial transactions – classic "money-laundering" operations – and thus to prevent the concealment and spread of criminal activity. See 132 Cong. Rec. S9626 (daily ed. July 24, 1986) (statement of Sen. Thurmond) ("Creation of a money laundering offense is imperative if our law enforcement agencies are to be effective against the organized criminal groups which reap profits from unlawful activity by camouflaging the proceeds through elaborate laundering schemes."). Congress did not intend to punish defendants twice for the same conduct by imposing additional penalties for the underlying activity that generates the illegal proceeds. See 132 Cong. Rec. S9938 (daily ed. July 31, 1986) (statement of Sen. D'Amato) ("we are creating a new crime of money laundering"). But, that is precisely what Petitioner's broad interpretation of the Act would do.

Notwithstanding the limited purpose of the Act, amici's experience is that the instant case reflects a typical and growing use of § 1956 as a vehicle for increasing potential sentences substantially in excess of what otherwise would be permissible for the underlying conduct – without any showing of the aggravated societal harm that the money laundering statute was designed to redress; that is, the disposition of ill-gotten gains to expand criminal enterprises or to disguise those gains by creating the appearance of legitimate wealth.

Because the Seventh Circuit's holding would prevent this misuse of § 1956, *amici* urge the Court to affirm.

ARGUMENT

I. THE MONEY LAUNDERING STATUTE IS SUBJECT TO EXPANSIVE INTERPRETATIONS THAT INVITE PROSECUTORIAL MISUSE.

This case highlights the inappropriate and unfair misuse of the money laundering statute to "tack on" additional charges and significantly enhanced penalties to punish conduct that is virtually indistinguishable from the underlying offense. The basis for the money laundering charges at issue here is the payment of winnings to the participants in the illegal lottery and the payment (and receipt) of salaries to the lottery's employees. That very same conduct was integral, not supplemental, to the continuing operation of the illegal lottery. But as a result of the additional money laundering charges, Respondents faced potential sentences of twenty years – four times longer than the five year maximum for the underlying offense. Indeed, Santos' actual sentence was close to that increased maximum. Pet App. 18a, 20a. Such an application of the Act was not intended by Congress. See *United States* v. *Stavroulakis*, 952 F.2d 686, 691 (2d Cir. 1992) (citing S. Rep. No. 99-433 (1986) and H.R. Rep. No. 99-855 (1986)); *United States* v. *Johnson*, 971 F.2d 562, 569 (10th Cir. 1992).

Congress's intent in enacting the money laundering statutes in 1986 was to fill a discrete gap in the criminal law by preventing the hiding and reinvestment of proceeds derived from criminal activity. See *United States* v. *Edgmon*, 952 F.2d 1206, 1213-14 (10th Cir. 1991) (discussing legislative history). Notwithstanding this clear intent, many courts have adopted extraordinarily expansive interpretations of the statute, applying it in circumstances that unfairly penalize defendants without doing anything to advance the statutory purpose.

For instance, the term at issue in this case – "proceeds" – has been construed in a variety of ways designed to broaden the statute's scope. The Government's theory in this case illustrates one such expansive reading. In other cases, contrary to the plain language of the statute, "proceeds" has been held to include worthless items. See *United States* v. *Akintobi*, 159 F.3d 401, 403-04 (9th Cir. 1998) (holding that, although the term "may refer to something of value," it "has the broader meaning of 'that which is obtained . . . by any transaction,'" and therefore included checks that "ultimately proved worthless because the accounts backing them up were either empty or closed") (citation omitted); see also *United States* v. *Estacio*, 64 F.3d 477, 480 (9th Cir. 1995), *as amended on denial of reh'g* (noting that courts "define the term broadly," and holding that "proceeds" included "[a] fraudulently obtained line of credit, which results in an artificially inflated bank balance").

The expansive interpretations of the term "proceeds" are all the more troubling because prosecutors and courts have also undermined the limiting effect of other essential terms in the statute, such as the "conceal or disguise" element and the "transaction" element. For example, the Second Circuit recently upheld the money laundering conviction of the owner of an armored-car business for transportation of cash, without requiring any evidence that the cash transportation was designed to create the appearance of legitimate wealth. *United States* v. *Ness*, 466 F. 3d 79, 81 (2d Cir. 2006), *petition for cert. filed*, No. 06-1604 (U.S. June 1, 2007).

Some courts also have found the "conceal" element satisfied when the defendant has done no more than commingle the proceeds of lawful and unlawful activity in a single bank account. See *United States* v. *Posters 'N' Things, Ltd.*, 969 F.2d 652, 661 (8th Cir. 1992) (deposit by "head shop" owner of shop proceeds into business account), *aff'd on other grounds*, 511 U.S. 513 (1994); *United States* v. *Sutera*, 933 F.2d 641, 648 (8th Cir. 1991) (deposit of gambling

proceeds into family business account bearing defendant's name).

Courts have broadly interpreted other provisions of § 1956 as well. To be convicted under § 1956(a)(1), a defendant must have conducted a "financial transaction," which § 1956(c)(4) defines as "a transaction which in any way or degree affects interstate or foreign commerce" involving, inter alia, "the movement of funds by wire or other means." Some courts have construed the phrase "or other means" to be virtually unlimited. See, *e.g.*, *United States* v. *Reed*, 77 F.3d 139, 143 (6th Cir. 1996) (delivery of money by courier "involved the movement of funds by wire or other means") (internal quotations omitted); *United States* v. *Wydermyer*, 51 F.3d 319, 326-27 (2d Cir. 1995) ("physical transportation of money out of the United States by hand" is a financial transaction by "other means"); *United States* v. *Dimeck*, 24 F.3d 1239, 1246 (10th Cir. 1994) (noting that physical delivery of cash is "movement of funds by wire or by other means"). According to one commentator, such interpretations have "the potential to extend the reach of the money laundering statute to any movement of property and greatly expand its scope." John K. Villa, *Banking Crimes* § 8:10 (2006). Another commentator expressed a similar concern:

> The continuing trend toward widening what is meant by financial transaction gives prosecutors ever more leeway in deciding when to use [section] 1956, because the occurrence of some kind of financial transaction is what triggers liability under the statute. In short, the pattern is that interpretations have become more draconian over time.

Mariano-Florentino Cuellar, *Tenuous Relationship between the Fight against Money Laundering and the Disruption of Criminal Finance*, 93 J. Crim. L. & Criminology 311, 348 (2003).

As a result of such expansive interpretations of these terms, many courts now punish as "money laundering" conduct that bears virtually no relation to the concept as it is commonly understood. See *United States* v. *Skinner*, 946 F.2d 176 (2d Cir. 1991) (sale of cocaine sufficient for conviction under the money laundering statute). "[T]he fluidity of the judicial understanding of these concepts means that defenses based on grammar and logic seem doomed to failure." Mary McNamara & Edward W. Swanson, *Money Laundering: How Prosecutors Clean Up under 18 U.S.C. Sections 1956 and 1957*, 26 Forum 61 (1999), available at http://www.smhlegal.com/articles/money520laund.pdf (last visited Aug. 21, 2007). These interpretations raise serious concerns that the power of prosecutors to bring a defendant's conduct within the statute has been unfairly and improperly expanded. "Distinctions in the details of [sections] 1956 and 1957 [a companion money laundering statute] should not obscure the prevailing pattern in the way courts parse the statutes' abstruse terms: with just occasional exceptions, over time the statutes' interpretation has tended to favor prosecutors." Cuellar, 93 J. Crim. l. & Criminology at 343.

II. EXPANSIVE INTERPRETATIONS OF § 1956 HAVE SIGNIFICANT NEGATIVE RAMIFICATIONS FOR THE CRIMINAL JUSTICE SYSTEM.

As this case demonstrates, an overbroad reading of the principal money laundering statute will have severe consequences for the many criminal defendants accused of violating it, and for the criminal justice system as a whole. Section 1956 imposes harsh penalties: a statutory maximum of up to twenty years' imprisonment and a fine of either $500,000 or twice the value of the property involved in the transaction, whichever is greater. Additionally, although the Sentencing Guidelines were amended in 2001 in an effort to "tie[] offense levels for money laundering more closely to the underlying conduct," U.S. Sentencing Guidelines Manual app. C, amend. 634 (2001), reason for amend. (2006), money

laundering charges can, as in this case, result in a sentence far greater than that for the predicate offense alone when the offense is not a drug trafficking crime. Villa, § 11:30 (Supp. 2006); see also Cuellar, *supra*, at 348-49 (2001 Sentencing Guidelines amendments left sentences for money laundering "severe enough that prosecutors and investigators could use money laundering charges as substitutes for underlying predicate offense charges that might be more difficult to prove against particular defendants"). Conviction under § 1956 automatically adds two offense levels to the base level offense applicable to the underlying offense, even if no other sentencing enhancements apply. USSG § 2S1.1(b)(2)(B).

The prospect of a higher sentence allows prosecutors to extract plea bargains and forfeitures that might not otherwise be obtained and that may not be in the interest of justice. See Eric J. Gouvin, *Are There Any Checks and Balances on the Government's Power to Check Our Balances? The Fate of Financial Privacy in the War on Terrorism*, 14 Temp. Pol. & Civ. Rts. L. Rev. 517, 534-35 (2005) (noting, in the context of anti-money laundering provisions in the USA PATRIOT Act, that "prosecutors have used money laundering violations as a device to leverage up the criminal consequences for regulated behavior, creating incentives for the accused to plea bargain"). Because an indictment with a § 1956 charge risks heavier sentence than does an indictment (for the same conduct) without such a charge, prosecutors have a great incentive to threaten such a charge to enhance their bargaining leverage. The mere threat of a money laundering charge thus can be a powerful weapon in the prosecutor's negotiating arsenal.

This vast increase in potential punishment is entirely unjustifiable if it is not accompanied by greater culpability on the part of the accused – and, specifically, by the culpability that Congress meant to punish when it enacted the statute in the first place. Instead, prosecutors and courts have interpreted § 1956 to apply to the myriad crimes where funds

are merely an aspect of the enterprise at issue and therefore to embrace conduct that comes nowhere close to presenting the dangers to society that the money laundering statute was designed to address. Defendants, including Respondents here, should not face enhanced potential sentences for conduct not meaningfully more blameworthy than the underlying predicate offenses.

III. THE SEVENTH CIRCUIT'S INTERPRETATION PROPERLY LIMITS THE SCOPE OF THE ACT.

The Seventh Circuit's interpretation of the term "proceeds" as limited to profits is consistent with congressional intent and necessary to prevent defendants from inappropriately being punished twice (and more severely) for the same conduct. Petitioner's argument to the contrary is unpersuasive, and actually demonstrates that Respondents' underlying conduct is indistinguishable from that which forms the basis of the money laundering charge.

Petitioner argues that the money laundering offense is separate and distinct from the gambling offense because "[p]roof that payments were made to employees or to winners is not required to establish a violation" of the underlying gambling statute, 18 U.S.C. § 1955(b)(1). Br. for U.S. at 41. But such an "identity of the elements" test does not answer the question presented here as to exactly what the elements of a money-laundering charge are. Petitioner's argument also fails in its additional effort to diminish concern about unfair multiplicity of charges. Even Petitioner admits that a charge under § 1955, which prohibits "illegal gambling *businesses*," requires a showing that the operation "must remain in continuous operation for more than 30 days or have gross revenue of at least $2,000 in any given day." *Id.* (emphasis added). Accordingly, the elements and purpose of § 1955 expressly contemplate the operation of a business, which itself implies the payment of expenses (and thus, "promotion" in Petitioner's view as well, see *infra*), along with the receipt of revenues – precisely the same requirements for application

of the money-laundering statute under Petitioner's expansive interpretation. There is thus every reason for concern that follow-on § 1956 charges may be purely "make weight" and open to arbitrary and capricious application.

Petitioner also contends that the payments made to employees or to winners make it possible for the operation to continue and thus amounts to "promotion" under the money laundering statute. See *id.* at 23. Thus, at least in those instances in which the basis for the § 1955 violation is the continuing operation of the scheme, Petitioner apparently would concede that the conduct which amounts to "promotion" is indistinguishable from the conduct supporting the § 1955 charge.

Interpreting "proceeds" to mean only profits avoids the problem of unfair multiplicity by ensuring that a money laundering charge is based on what Congress intended – the re-investment of illegal *profits* to *expand* unlawful activities.

CONCLUSION

For the foregoing reasons, as well as those stated in Respondents' Briefs, the judgment of the Seventh Circuit should be affirmed.

Respectfully submitted,

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August 22, 2007

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, :

Petitioner :

v. : No. 06-1005

EFRAIN SANTOS AND :

BENEDICTO DIAZ :

Washington, D.C.

Wednesday, October, 3, 2007

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

MATTHEW D. ROBERTS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

TODD G. VARE, ESQ., Indianapolis, Ind.; on behalf of Respondent.

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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in case 06-1005, United States versus Santos.

Mr. Roberts.

ORAL ARGUMENT OF MATTHEW D. ROBERTS

ON BEHALF OF THE PETITIONER

MR. ROBERTS: Mr. Chief Justice, and may it please the Court:

The Seventh Circuit misconstrued the Federal money laundering statute by interpreting the term "proceeds" to mean profits. The statute prohibits the laundering of all the gross receipts of a crime, not just its profits. The primary meaning of "proceeds" is gross receipts, and the statutory context makes clear that's the meaning Congress intended here. The statute is structured to prevent criminals from using the fruits of their crimes to promote or to conceal their illegal activities. But a profits definition of proceeds would constrict the statute in ways that can't be squared with that statutory objective.

Because the word "proceeds" appears in the introductory section of the statute, those kinds of restrictions would apply to both concealment and promotion cases.

For example, the statute wouldn't cover expense payments that are structured to conceal the unlawful nature and source of the funds involved. That means that if an illegal gambling operator recorded the compensation that he paid his collectors as salary payments by a legitimate business that he owned, that that would not be covered under the statute.

JUSTICE SCALIA: Where -- so what?

MR. ROBERTS: Well, Congress was trying --

JUSTICE SCALIA: Is there some rule up there that says every criminal statute has to cover as much as possible?

MR. ROBERTS: No, Your Honor. That's not what we're arguing. What we're arguing is that there is no reason that Congress wouldn't have covered these transactions and that they implicate the objectives of the statute as revealed by its text, just as much as the transactions that are clearly covered.

JUSTICE SCALIA: I think it -- I think it much more remarkable than that, more extraordinary than that, that Congress would want to make all -- all betting operations like this a violation automatically of two criminal statutes.

MR. ROBERTS: Well, Your Honor --

JUSTICE SCALIA: I find that sort of, you

know, very strange.

MR. ROBERTS: -- it is certainly true that illegal gambling and money laundering are going to occur together, but that isn't a cause for concern. It just reflects the fact that certain businesses, illegal businesses like gambling operations, like drug dealing, frequently generate large amounts of cash and they need to launder that cash in order to survive and to prosper.

JUSTICE GINSBURG: It is hard to see this -- that, just in the sense of laundering, nothing is being concealed. They're not -- the money that's being paid to the runners and the collectors, it is an ordinary and necessary expense of the illegal business.

So I think Justice Scalia was emphasizing that this is, for the very same conduct two discrete statutes, one with much heavier penalties. That makes it odd, too, that the basic gambling statute has a lower penalty than this money laundering statute, and yet it's the same conduct that's violating both.

MR. ROBERTS: Well, it's not the same conduct in that the conduct here, the paying the winners and paying the collectors is not a required element of the gambling offense.

JUSTICE SCALIA: Oh well, I mean -- come on. Nobody -- nobody runs a gambling operation without

paying off the winners. It's not going to last very long.

MR. ROBERTS: And, true --

JUSTICE SCALIA: To make the paying off of the winners a separate crime from running the gambling operation seems to me quite extraordinary.

MR. ROBERTS: It -- it -- it's true, Your Honor, that they're not going to last very long. They're not going to survive. They're not going to grow. That's because they need to commit money laundering in different ways to do that.

JUSTICE SCALIA: But even if --

JUSTICE KENNEDY: Can you tell me what happens if there's a -- two bank robbers, the one's with the get-away car; the other one going into the bank teller, and the robber that goes into the bank gets $1,000 and comes out and gives 500 to the get-away guy. Is that a violation of the statute?

MR. ROBERTS: That is, if the -- if the payment would promote the continuing -- if they've got a continuing robbery operation and by paying him he's going to say, he's saying, you know, keep on continuing in the operation and let's expand it further.

JUSTICE SOUTER: Then under your theory the employee who gets paid shows up for work the next

morning; and so, of course, under your theory it would be promotion.

MR. ROBERTS: Your Honor, your question and a lot of the questions I'm getting, I think express concern about treating these transactions as promotion under the statute. But the question --

JUSTICE SOUTER: I would have the same concern if we were dealing with concealment.

MR. ROBERTS: What I don't --

JUSTICE SOUTER: If the robbery takes place in a dark alley, is that automatically concealment?

MR. ROBERTS: No, because what needs to be concealed, what there needs to be is a financial transaction that's designed, the transaction itself, to conceal the nature and source of the proceeds.

JUSTICE SOUTER: That's going into the alley instead of doing it out on the --

MR. ROBERTS: I don't think that doing a robbery in the alley would be a financial transaction -- would be designing a financial transaction to conceal the unlawful nature and source of the proceeds.

But if I can give you an example of --

JUSTICE ALITO: Mr. Roberts, isn't it true that the problems that are being highlighted are problems that result from expansive interpretations of

other concepts that are not before us here, expansive interpretation of promotion, expansive interpretation of concealment?

The Seventh Circuit in the first appeal in this case interpreted promotion very broadly. And then, I guess it felt that it had boxed itself in and that's what led to this interpretation of proceeds. But if you interpret those other concepts more narrowly, you don't have the same kind of overlap.

MR. ROBERTS: I agree with that, Your Honor. I was going to try to say to Justice Souter's question before that if you have concerns that these kind of expense payments should not be treated as promotional money laundering, the way to address those is not by adopting a profit construction of proceeds, because that would do tremendous violence to the statute in other ways.

And I do think that there are --

JUSTICE GINSBURG: What about the qualification that Judge Easterbrook made when he said, at least where the crime is a business-like operation? He gave the example of gambling, he gave the example of selling contraband.

And it seems to me that he was narrowing his definition of proceeds to cases where the crime is not

robbery or a one-time event, but a business-like operation.

MR. ROBERTS: Well, I think it's difficult to interpret the proceeds, the term "proceeds," to mean something different for business operations than for other crimes because it's the same word. But even so, Your Honor, there are other ways --

CHIEF JUSTICE ROBERTS: Why don't you continue. I'm sorry. I didn't know you weren't done.

MR. ROBERTS: Okay. I'm sorry.

Even so, there are other ways in which a profits definition just makes no sense under this statute, besides the numerous concealment transactions that would be excluded that Congress would have no reason not to cover. It also would make no sense as applied to professional money launderers. Those are people who are hiding money for criminals as a matter of their business. Because they wouldn't be guilty of money laundering, even if they knew that they were concealing money that was generated by a Federal felony, unless they also knew that the money was profits.

CHIEF JUSTICE ROBERTS: I thought your answer to the line of questioning that we were having was that the problem would still be there, even if you limited this statute to profits. You take the two bank

robbers in Justice Kennedy's hypothetical, the one that robs the bank, the other in the get-away car. If before the robber gave the money to the person in the get-away car, he said, now, you know, I'm keeping $100 because I had to buy the gun and that was $100, so you only get 400, so it's only the profits that they're splitting, you'd have the same problem, wouldn't you?

MR. ROBERTS: That's right. That's another point, Your Honor, that a profits definition itself isn't going to solve the problem of where the underlying crime and the money laundering --

JUSTICE SCALIA: It will solve a lot them. And unless you're willing to come in and say, yes, do it to us, give us a narrower definition of concealment and a narrower definition of what's a transaction, but you're not willing to do that. You're going to stretch that as broadly as you can.

MR. ROBERTS: It's not going to -- it's not -- first of all, this case doesn't present the interpretation of promotion and the Court would be free to address that in --

JUSTICE STEVENS: Maybe the question presented doesn't present it -- -

MR. ROBERTS: Yes.

JUSTICE STEVENS: But I think the facts of

the case do present it. I mean, it's theoretically possible we could agree with you on the profits issue, but nevertheless say this doesn't fit the promotion.

MR. ROBERTS: You certainly could, Your Honor. But that would not be an alternative ground that would be appropriate for you to rule on in this case, because that issue was raised on direct appeal. It was decided against Respondents by the --

JUSTICE STEVENS: I understand all that, but we can still do it if it's perfectly obvious that that's the right way to dispose of the case.

MR. ROBERTS: You can obviously address any issue that you want to, Your Honor. But the ordinary rule is that issues that have been decided on direct review shouldn't be relitigated on collateral attack. The issue wasn't addressed by either of the courts below in these collateral proceedings.

JUSTICE GINSBURG: Wouldn't it be --

MR. ROBERTS: We do submit that it was resolved correctly in this case, because, as the Seventh Circuit held and as all the other courts of appeals have held about promotion, the payments to the winners and the payments to the collectors encourage the continued participation of the collectors and encourage the increased participation by gamblers.

JUSTICE GINSBURG: Mr. Roberts, the Seventh Circuit in this case was following a precedent in another case and it thought that the defendant was would prevail under its theory.

If this Court should say that that theory, that it's profits and not proceeds that matter, wouldn't it be appropriate for us, if we don't decide the question ourselves, to remand and say, Seventh Circuit, your precedent was wrong; but you could consider a question that was not necessary for you to reach because you had your precedent on the profits issue?

MR. ROBERTS: You could do that, but the question that I think that is concerning the Court was resolved by the Seventh Circuit in this very case on direct appeal. So on direct appeal, the argument was made by Mr. Santos that these transactions can't count as promotional money laundering because they're essential transactions of the business and that they don't promote the carrying on of the business, and the court of appeals rejected those arguments.

JUSTICE SCALIA: You might well reject it if you're going to have a narrow definition of proceeds. I mean, that rejection was connected with its acceptance of a narrow definition of proceeds. And if you're asking us to obliterate the latter, I don't know why it

isn't reasonable to send it back to the Seventh Circuit and say, well, you still said the same thing if you came out differently on the proceeds question.

MR. ROBERTS: Well, we certainly would prefer that you did that than that you interpreted proceeds to mean profits because of the violence that it would do to the remainder of the statute, Your Honor.

I was talking about professional money launderers before and how they wouldn't be guilty of money laundering if they were concealing money that they knew that was generated by a crime. And Congress -- there's no reason that Congress would have considered those professional money launderers to be less culpable merely because they might be laundering only illicit receipts.

And It would be very difficult for the government to prove that professional money launderers knew that they were laundering profits because they haven't participated in the predicate crime.

JUSTICE BREYER: I've got that point, but what is your suggestion as to how to deal with what is underlying disturbing me and it seems like a lot of others, if prima facie Congress did not intend that you launder money where the activity is an essential part of the underlying crime itself? And there are three ways

of dealing with that:

One is this gross receipts method, which has the defects you mentioned.

The second is a definition of "promotion" which says when you promote a crime that's different from engaging in the crime.

And the third is sentencing; because it's a real offense sentencing method and where what you've done is nothing more than the underlying crime, the sentence should be nothing more than the underlying crime. I see three ways to get to the same problem, and you're asking us to decide them piecemeal, yet they're related. What do I do?

MR. ROBERTS: Well, I think you decide the question presented here and you decide that proceeds means that -- that proceeds means gross receipts, because that's the only meaning that makes sense with the statute.

But the sentencing point you make is a very, very good one, Your Honor. And the fact is that the Sentencing Guidelines were changed in 2001 to align the punishment for money laundering when people participate in the underlying crime much more with the punishment level for the underlying crime.

And -- you know, in addition, as we know,

the Sentencing Guidelines are advisory, and so courts could certainly take into account concern about overlap --

JUSTICE BREYER: But still your answer leaves me -- and I have no answer to this; I want yours. I want you to see that I'm in -- at risk here as a judge of getting whipsawed, that I first decide this case for you; and the next case, all kinds of arguments appear that I hadn't thought of; and then the third case, again. But if I could have them somehow together, I could look at the least evil way or the most efficient way of achieving the congressional objective.

MR. ROBERTS: Well, I think that you can't have all of them together, Your Honor, unfortunately. But I do think that we would say that out of the three that you raised, the best way to deal with concerns about this would be in the sentencing context.

JUSTICE SCALIA: I find that extraordinary. You really come in and say yeah, two crimes, assume Congress meant ordinary gambling crime to carry with it this other extraordinarily high penalty for the same activity that involves the gambling, but don't worry about it, we'll even it out in the sentencing.

I mean -- that's no way to run a railroad.

MR. ROBERTS: It's not -- Your Honor, it's

just not exactly the same activity, because people can commit gambling without commit money laundering. They can be guilt of illegal gambling without being guilty of money laundering --

JUSTICE SCALIA: Straighten that out in the definition of the crime, rather than in the --

MR. ROBERTS: But they can be -- even under this definition, Your Honor. In this very case there were restaurant and tavern owners that permitted the gambling bets to be taken on their premises because it increased their -- the patronage of their businesses. And they were convicted of participating in illegal gambling operations. They didn't commit money laundering, because they didn't engage in a financial transaction that's not an element of the gambling offense, that involves the proceeds of the offense, and that's intended either to conceal the proceeds --

JUSTICE STEVENS: -- Mr. Roberts -- that the gambling offense is conducting a gambling business, so it makes it -- it is not just the gambling itself --

MR. ROBERTS: It is -- but the statute defines what the three -- the statue defines what the three elements of the gambling business are, Your Honor. That it's illegal gambling that's illegal under State law, that involves 5 or more persons, that it has --

continues for more than 30 days or has more than $2,000 in gross revenues in a day.

JUSTICE SCALIA: What continues? The business has to continue. You are not engaging in a gambling business if you're not paying off the winners. That's all. That's not a good decent honest gambling business.

(Laughter.)

MR. ROBERTS: The gambling business -- it might be gambling and fraud, Your Honor. But the gambling business can continue for more than 30 days without having paid the winners if they had a lottery every month, and it was at the end of the month -- they hadn't paid the winners yet, it would have gone for the 30 days, in a 31-day month without -- without having paid the winners.

JUSTICE KENNEDY: And -- if your definition of proceeds is problematic, it is something like an abstract question you're asking us to answer. If this -- if we say well, we're not sure this is proceeds but if it is proceeds, it is defined as gross receipts.

That's an artificial context in which to address the issue.

MR. ROBERTS: Yes. I think that what they're asking you to do is to interpret -- and what the

Seventh Circuit has done, is to interpret proceeds in a way that makes no sense for the statute in order to deal with these concerns about promotion cases that can be dealt with in the other ways that Justice Breyer raised. And there are really four --

JUSTICE GINSBURG: Mr. Robert, may I go back to something you said about -- of the options that Justice Breyer mentioned.

You said the way to handle it is in sentencing.

Santos was sentenced to 60 months on the gambling counts and 210 months on the laundering. You said the statute has been changed. So what would be the sentence under the statute as it now exists? And this is vastly disproportionate. 60 months for gambling, and 210 for money laundering.

MR. ROBERTS: I'm sorry, Your Honor. I probably should know the answer to what the precise range would be under the guidelines. Now, I don't. But what I do know is before, the way the guidelines worked was that the base offense level for a money laundering crime was not tied to the offense level for the underlying offense. So it was set I think starting at 23 for promotional money laundering.

But what happened in 2001 is that the

commission changed the rules so that when you -- when the money laundering involves the person who participated in the underlying offense and has also done the money laundering, you start with the offense level for the underlying offense and then you make some minor increases depending upon the type and the --

JUSTICE BREYER: I have it in front of me actually. I was looking at it. And it seems to me what it assumes is that the underlying offense is different from the money laundering. And do you have any rationale at all as to why this individual, if it's true that he did nothing more than engage in the underlying offense, why should he receive one day more than 60 months?

MR. ROBERTS: Well, because he does engage in something more than what he needs to do to be punished for the underlying offense, and that conduct is -- and that conduct is -- promotes ongoing crime or can conceal ongoing crime in ways that are just what Congress was getting at in the statute. And --

JUSTICE SCALIA: Because gambling under the definition has the three elements that do not include paying off the winners. That's what it all represents --

MR. ROBERTS: Because -- well, that's one

thing, but the other thing is, Your Honor, if I could talk about the ways that the proceeds definition just doesn't make sense here. If these expense payments -- the expense payments for instance, the payment of the salary that Mr. Santos made to Mr. Diaz -- it happens in this very case, although we didn't prosecute it as concealment money laundering -- that he recorded those payments as salary payments by a printing business that he owned.

And he's doing that to conceal the activity, to enable it to keep going. And that's just what Congress was trying to get in the statute. Wouldn't be covered under a profits definition. If criminals concealed the gross receipts temporarily until they pay the expenses -- for instance, if a gambling operator takes the money that -- his illicit receipts from the gambling, and he puts it in the bank account of the printing business. And then later he uses it to pay the winning betters, he's doing that to hide it so the gambling operation can keep going. That's what Congress was trying to get at here. That wouldn't be covered.

That -- that evades detection just as much as transactions that hide profit.

JUSTICE STEVENS: You are saying it would not be covered as money laundering, but nevertheless it

would be illegal and be punished as gambling.

MR. ROBERTS: Yes, it would, Your Honor. But the conduct, the concealment conduct --

JUSTICE STEVENS: And everything they've done here would be punished as gambling --

MR. ROBERTS: -- the concealment conduct is additional conduct, and it is what Congress wanted to get at here, and a profits definition would mean that it is excluded from the statute.

And it would exclude the --

JUSTICE KENNEDY: Well, you see the problem we have is we're not sure that it is within the statute. So then you're asking us to say how to make the statute work when we don't think the statute's applicable at all.

MR. ROBERTS: Well, I guess if you don't think that concealing expense payments should be covered, if you don't think concealing money that is --

JUSTICE STEVENS: Can you imagine running a illegal gambling business and advertising your expenses? I mean, you have got to conceal these --

MR. ROBERTS: It's not a question of advertising them, Your Honor. It's not a question of advertising them, but it is a question of taking additional conduct to conceal them.

JUSTICE STEVENS: But it's not additional conduct. That's the point.

MR. ROBERTS: It is additional conduct. He didn't need to record it on the books of the -- on the books of his printing business.

JUSTICE SOUTER: What if he puts it in a tin can and buries it in the garden? Is that additional conduct?

JUSTICE SCALIA: Of course it is.

MR. ROBERTS: It's additional conduct, but it's not designed to conceal the unlawful nature --

JUSTICE SOUTER: Why isn't it? Do you put your salary in tin cans in the garden?

MR. ROBERTS: I might like to keep my money in the cookie jar -- and it's perfectly legitimate money, Your Honor -- because I don't want when someone comes into my house that -- for them to steal the cash.

JUSTICE SOUTER: I just don't see how you can make the distinction you're making, and therefore I don't see how you can avoid Justice Stevens's problem.

MR. ROBERTS: If he takes the money, Your Honor, and he structures his payments to his employees by making them -- or to his suppliers, by making them in $9,000 increments in order to evade transaction reporting requirements, that wouldn't be covered either

under this interpretation of the statute.

JUSTICE ALITO: Mr. Roberts, isn't it true that the Seventh Circuit's interpretation of proceeds doesn't really solve these problems except in the case of an unprofitable business? In the case of a profitable illegal enterprise, all of the same problems exist.

MR. ROBERTS: I think there are many situations, as the Chief Justice pointed out, in which a profits definition isn't going to be enough to solve it. For instance, just a drug dealer accepts payment for the drugs. If that money exceeds the cost of the business, it would presumably be profit and without some other requirement in the statute, it would count as money laundering. And for instance, when street-level dealers that are employed by a drug kingpin turn the receipts over to the kingpin even after they've take out their share, let's say -- under a profits definition if those receipts exceeded the costs of the business that would also be covered as money laundering. So I think it's very true that the profits definition isn't going to solve all the problems as well.

That's a -- you know -- another point about it.

It also means that what we have to prove

profits that that's going to be very difficult for us to do even in cases that don't involve these expense payments because criminals often don't keep accounting records. They certainly don't keep records that are accurate and complete and decipherable by law enforcement. And Congress recognized the lack of hard evidence of criminal profits, and for that reason Congress provided for the forfeiture of proceeds rather than profits in the RICO and drug forfeiture statutes. And there's no reason to think Congress took a different approach here in the money laundering statute, two years later, when it used the same term "proceeds."

There's also -- there's the issue of the uncertainty that would be created by a profits definition, because it would raise all these questions, and there are no accounting rules to resolve them.

And even the court below acknowledged that it's difficult to determine what is and isn't net income, and that the line between paying expenses and reinvesting that income is murky.

And I don't think the Court should lightly assume that Congress intended a definition of an element of the offense that's going to raise these numerous issues about the scope of that essential element of the offense. And the Court is going to have to resolve them

all without any guidance from Congress.

So if I could reserve the reminder of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. ROBERTS: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Vare.

ORAL ARGUMENT OF TODD G. VARE

ON BEHALF OF RESPONDENTS

MR. VARE: Thank you, Mr. Chief Justice, and may it please the Court:

Justice Ginsburg, you have suggested correctly that the only conduct in this case was the payment of ordinary and necessary expenses of the business.

Justice Scalia, you correctly suggested that paying off winners is necessary to every gambling operation.

Justice Breyer, you have correctly suggested and stated that the money laundering statute is intended to punish different conduct, different criminal activity than the underlying criminal activity.

CHIEF JUSTICE ROBERTS: Didn't Justice Alito correctly suggest that these merger problems would still persist even under your definition of "proceeds"?

MR. VARE: I think that that is not

necessarily true. The merger problems would -- would exist except for the "profits definition," certainly on the facts of these cases -- on this case.

On this case the only facts that were presented by the Government -- and they have conceded that they did not present any evidence of profits.

CHIEF JUSTICE ROBERTS: No, but I mean if you have a "profits" definition and the enterprise has profits, all of these problems we've been talking about in terms of the merger, as I call it, between the money laundering and the underlying offense would still be there, right?

MR. VARE: Yes, Your Honor. There would. There would. And, in fact, Justice Alito also correctly suggested that the reason why the Scialabba panel decided the "proceeds" definition is profits was because of the expansive interpretation and application of the other aspects of the statute, and that they were left with essentially no choice.

JUSTICE SCALIA: So why are you urging us to create two problems, to drag along all of the problems that you object to with -- with interpreting proceeds to include simply covering your expenses? You acknowledge that the problems you point out would continue to exist if we accept your definition.

On the other hand, I think you have to acknowledge that accepting your definition creates other problems of its own, such as the difficulty in every case of showing that an illegal operation made a profit, such as the difficulty of deciding what kind of criteria you use for determining what are the -- what are the ordinary and necessary expenses of a criminal enterprise.

Why should we -- why should we choose to get the worst of both worlds? And why isn't the proper way to attack the difficulty to focus in on what constitutes a transaction and what constitutes concealment -- something other than the "proceeds" definition?

MR. VARE: I think you're absolutely correct, Justice Scalia. And, in fact, in our opposition to the petition for cert in this case, we made this very point as to why this was not the right case to determine all of these issues, and particularly the burdens that have been presented by the government.

JUSTICE KENNEDY: Did you argue at any point that these were not proceeds?

MR. VARE: Yes, Your Honor, we did. Justice Kennedy, in the briefing in the opposition to cert and in our response brief, we have set forth distinct arguments that there are not separate

transactions distinct and different from the underlying criminal activity.

JUSTICE KENNEDY: Did you argue that in the court of appeals?

MR. VARE: That was presented as -- that was presented as part of the Febus decision as an argument that those transactions did not constitute distinct and separate transactions from gambling. That was presented in the pro se petition and acknowledged by the government in responding to the pro se petition below.

The government acknowledged that the question in Febus, the question in Scialabba, the question in this case on habeas are legally and factually indistinguishable. And I think Justice Stevens has suggested that all of this is inherent in the question presented.

A fair -- it is fairly included because to look at the statutory context of the word "proceeds" is necessary for an intelligent resolution of the meaning of that word as well as how it plays throughout the rest of the statute.

JUSTICE BREYER: The question is can you violate the statute by financial transactions which -- have you promoted the crime, when those transactions are no more than part of the crime itself?

That's basically the question. And I think Justice Kennedy is asking if, in fact, we wanted to reach that question, is this a case in which we could do it, through reargument or in some other way?

MR. VARE: I think that that is a question that this Court could resolve on the facts of this case, or --

JUSTICE BREYER: And was it raised in the court below?

MR. VARE: It was -- it was raised in the court below as -- as inherent -- well, it was certainly raised in the Febus, in the direct appeal.

It is inherent in the 2255 petition filed pro se by my client, Mr. Santos. It was acknowledged by the government that these issues are not legally or factually distinguishable.

And again, it is inherent in the question that's presented. The money laundering statute requires conducting a financial transaction involving the proceeds of the specified unlawful activity with the intent to promote the --

JUSTICE KENNEDY: Well, I think it is a stretch so far as the question presented. The question presented is very clear whether or not it is gross receipts or net profits. That's what we're asked to

resolve.

JUSTICE GINSBURG: That's not your question presented.

MR. VARE: Absolutely not, Justice Ginsburg. It is not our question presented, but we do feel that, even in answering that question, whether or not it is net or gross does require looking at the term in context. And -- and the context, we're not looking at a different statute.

CHIEF JUSTICE ROBERTS: I didn't see that you presented -- a separate question presented in your opposition.

MR. VARE: We did , Your Honor.

CHIEF JUSTICE ROBERTS: Where is that?

MR. VARE: In the -- Mr. Chief Justice --

CHIEF JUSTICE ROBERTS: Not at page (ii).

MR. VARE: In Mr. Santos' brief. And the question presented there was --

JUSTICE KENNEDY: Brief in opposition --

MR. VARE: The brief in opposition on the very first page.

CHIEF JUSTICE ROBERTS: Oh, but I am looking at the orange one, not the red one. The orange one is what we have before us when we decide whether or not to grant certiorari. And there you don't have a different

question presented.

MR. VARE: No, we did not -- in the opposition to the cert petition we did not present a different question presented as a question presented.

But we did present the argument -- Mr. Santos did and Mr. Diaz did -- that there were no separate transactions that promoted the carrying on of the specified unlawful activity. Rather, all that the government had presented in this case was merely conducting the illegal gambling business.

CHIEF JUSTICE ROBERTS: If we adopt your position, we will have to decide a question like, for example, if the argument is I didn't have any profits because I had to pay $10,000 for a hit man to kill somebody, we would have to have a judicial decision that, yes, paying hit men is the ordinary and necessary business expense in carrying out illegal gambling operations, right?

MR. VARE: I think, Mr. Chief Justice, in any case you're going to have to look at what the specified unlawful activity is in the context of a money laundering prosecution, because that is part of the context.

And so in this case you have to look at what is the ordinary conduct of an illegal gambling business.

And I would suggest that paying off a hit man most likely would not fall into that category. But, certainly, as many of the Justices, including Justice Scalia and Justice Stevens and others have suggested, that when a gambling business pays off its winners, that is inherent -- that is integral -- to conducting a gambling business. It is not --

CHIEF JUSTICE ROBERTS: Let's take two illegal gambling operations that are identical in every way except that the one pays the runners, you know, $200 a week. The other pays the runners $500 a week. And the one that pays $500 doesn't make any profits because he's paying too much to the runners.

The first one, the more successful operation, you say, can be prosecuted for money laundering because its has profits. The other one doesn't. So incompetence is rewarded.

MR. VARE: No, Mr. Chief Justice. I would say that neither one could be prosecuted for money laundering because in both situations --

CHIEF JUSTICE ROBERTS: But the --

MR. VARE: -- when in both situations the gambling operator is simply paying off ordinary business expenses. Just the collectors who are part and parcel of running the illegal gambling business, they're one of

the participants. And that's part of the illegal gambling statute, is that you have to have five or more participants.

CHIEF JUSTICE ROBERTS: No, I'm focusing on the question presented -- that was the only question presented when we considered whether to grant certiorari by either of the parties, and that focuses solely on the question of whether "proceeds" is considered gross revenues or profits.

MR. VARE: Well, Mr. Chief Justice, what I -- what I believe is the answer to your question is -- is you cannot look at the term "proceeds" in isolation. And Justice Breyer, you know, suggested that the reason why we're even here today, arguing about what I believe is just absurd and unwarranted results on the facts of this case, is because the courts below -- and the government has proposed expansive interpretations -- the courts below have adopted, in some cases and not others, these expansive interpretations.

JUSTICE ALITO: But this doesn't -- "proceeds" must mean the same thing in every money laundering case, doesn't it? And every money laundering case is not based on a gambling business. There are drug businesses and all sorts of other predicates.

MR. VARE: Well --

JUSTICE ALITO: Can it mean something different in -- depending on the underlying illegal activity?

MR. VARE: I think there is certainly a suggestion, but that this Court itself has made recently in the Duke Energy case, that a term can have multiple meanings, multiple shades of meanings, and that will depend upon the context. So you have to look at the context and the specified unlawful activity is context.

Now, I'm not suggesting that we adopt a definition of proceeds as net profits in one case for one unlawful activity or gross profits for another unlawful activity or gross receipts for another one.

But the problem that we have presented to us today is due to the piecemeal construction and application of this statute and --

JUSTICE SCALIA: Mr. Vare, you know, I'm -- I'm unwilling to decide the definition of transaction question in the present case because, frankly, I think that's a -- in itself, a very difficult question which we haven't had adequately argued. For example, while I believe, as I've indicated earlier, that paying off the winners is -- is an essential part of a gambling operation, I don't believe that paying off runners necessarily is. You can have a gambling operation

without runners, can't you? You can --

MR. VARE: You could have --

JUSTICE SCALIA: You can -- you can view that as something beyond the mere -- the mere gambling crime. I don't -- I don't think you can view that paying off the winners is beyond the gambling crime, but I do think having a bunch of runners and paying off each of them is not necessarily part of gambling.

MR. VARE: Well, you can have a gambling business without runners per se.

JUSTICE SCALIA: Exactly.

MR. VARE: But you do need, Justice Scalia, you do need five or more participants. And the courts below have defined participants as -- as owners or partners, bartenders, cocktail waitresses, doormen, employees of the business.

And if those are qualifying participants to even establish the -- the predicate for an illegal gambling business, then those participants are most likely going to get paid, and if they get paid, then that is simply part of conducting an illegal gambling business.

I think the fact -- I mean, the fact that the runner in this case, the bet collector, Mr. Diaz, is probably -- you know, illustrates best the unwarranted

result in this case. Mr. Diaz did nothing more in this case than collect wages of about $150 a month or a week, something along those lines, for simply collecting debts, and he was convicted of money laundering and sentenced to 9 years in jail.

Mr. Santos, my client, all he did was pay winners and pay those bet collectors to collect debts, and he -- his sentence was nearly quadrupled.

CHIEF JUSTICE ROBERTS: So someone who simply paid off whoever it is that ships in, you know, a ton of heroin, you'd say is not guilty then? Same thing. I mean, you're just paying off the people who engage in the activities that are necessary for the continuation and promotion of the illegal enterprise.

MR. VARE: Well, I -- I think in that case, Mr. Chief Justice, I would -- I would suggest it might be an incomplete hypothetical, because simply paying the expenses of a crime or simply buying more drugs is not in and of itself -- and I think the government has conceded that in their opening -- that's not in and of itself money laundering. There has to be a transaction that is conducted with the intent to promote the carrying on or separately a transaction that is designed to conceal the legitimate or the illegitimate source of -- of the funds received.

So simply receiving proceeds from an unlawful activity is not enough. And that's clear on the statutory language. You either have to have some promotion element or some concealment element.

JUSTICE ALITO: Let me go back to the question of the definition of "proceeds."

Isn't it very unlikely that Congress would have wanted -- wanted to adopt the net income definition in light of the legal issues and the problems of proof that that would involve?

Let's take the example of an international drug ring that has assets in a foreign country. They may have crops. They may have processing plants, warehouses, trucks, airplanes, et cetera. They ship millions of dollars of drugs into the United States. They get millions of dollars in gross revenue here every year. They hire a professional money launderer to launder the money here. Now, the Government wants to prosecute the money -- the person they hired plus members of the organization.

The person they hired may not know and may not care whether the money that was being laundered was profits or not. And how are you going to prove what -- whether this enterprise was a profitable enterprise or not? They may have -- and they may have enormous gross

revenue, but they may have -- they may have enormous expenses overseas. They may have bought a lot of warehouses and equipment. They may have lost a lot of things because they were raided by the government, destroyed the factory, killed the plants.

It becomes as impossible situation, and why would Congress ever have adopted a definition like that?

MR. VARE: Well, Justice Alito, I don't think it's an impossible situation, number one, and I'll get to that in a second. To address your first question, could Congress have intended this to mean profits knowing that the burdens were so difficult?

To answer that question, then you must look at what else Congress intended, and there's no question that Congress intended to punish different conduct than the underlying criminal activity.

And then you have to look at what Congress intended to get at when they wanted to fill the gap in criminal law, when they want wanted to punish crimes that were not previously punished.

They focused on getting at ill-gotten gains of criminal enterprises. They focused -- and our briefs, you know, set forth the statements that are replete through the debates on the floor, that the Congress was focused on profits of criminal enterprises.

Congress was not focused on the unprofitable criminal enterprise because --

JUSTICE ALITO: I'm sure that's true. They wouldn't be that worried about the unprofitable criminal enterprises because they wouldn't last very long. But there's the -- there still is the problem of proof --

MR. VARE: Absolutely, Justice Alito.

JUSTICE ALITO: -- proving that it's profitable.

MR. VARE: And the proof problem --

JUSTICE SCALIA: Not just proving that it's profitable; proving that the person laundering it knew that it was profits because that's part of the definition of the crime, that scienter. And how can you prove that the fellow knew that it was profits? He would very rarely know whether it was or wasn't. So he skips off scot-free free of the laundering crime.

MR. VARE: Well, Justice Scalia, the intent or the knowledge or the scienter requirement is going to be present. It's going to be a burden on the government to prove, no matter what definition of proceeds is.

But in terms of proving profits, the government is able to prove profits in other criminal financial transaction-type cases in a number of ways. They're not limited to a particular accounting method.

They can choose the accounting method that they want. They're not limited to looking at day after day after day, week after week after week of financial records. They can aggregate records that are selected from particular points in time. And even in --

CHIEF JUSTICE ROBERTS: Well, how do they know even what the fiscal year of these enterprises is? I mean let's suppose you have some costs. They have to buy the poppy field or wherever, but, you know, over 3 years, they're going to make a lot of money. You're saying you can't prosecute them in year 2?

MR. VARE: No, I'm not saying that at all, Mr. Chief Justice, and I think my point would be the government would not even need to look at a fiscal year to prove profits. They would be able to look at a period of time and through their extensive search and seizure efforts --

CHIEF JUSTICE ROBERTS: My point is the profits may not come in immediately, even though the underlying activity is exactly the same.

MR. VARE: That may be the case. They may have a difficult burden of proving profits in the early stages, but most of these prosecutions practically occur after a period of time.

JUSTICE SCALIA: I mean what -- what's the

total stage you look at? Suppose it's profitable 1 month and not the next month, and the loss the second month more than undoes the profits of the first month. Can you still prosecute them for the profits in the first month?

MR. VARE: Certainly, based upon the profits in the first month. They're not limited to that. I mean --

JUSTICE SCALIA: One day they could pick then, they have one good day. And they could --

MR. VARE: And they could profit on that one good day if there are other transactions involved in the profits.

JUSTICE KENNEDY: What about the bank robber -- there's just one bank robbery. They spend $500 to each, to people for their airfare and car rental. They rob the bank. They only get $800. They lost $200. They then give the $800 to the attorney to please -- or to somebody to please launder the money. No profits?

MR. VARE: I don't think that that --

JUSTICE KENNEDY: That would be a very silly result.

MR. VARE: Well, I -- I don't think that, under that hypothetical, even the government would charge those criminals with money laundering.

JUSTICE KENNEDY: No. They gave it to a third person to conceal it, $800.

MR. VARE: Well, if there's --

JUSTICE KENNEDY: 8,000, 8 million.

MR. VARE: Simply giving money to somebody else does not meet the concealment and disguisement element. I mean, there has to be an effort made to disguise the source of the income as being illegitimate.

JUSTICE KENNEDY: Assume that it's proceeds. Assume that they have a money launderer. Under your definition there's still no violation?

MR. VARE: I suppose I would say no. And I'm going to explain why I have to say no, and I'm going to give you a medical word. The profits construction is not perfect. There's no question about that.

But we're here today because it's the only way to resolve the case that came up to this Court based upon the expansive interpretations of the rest of the money laundering cases.

CHIEF JUSTICE ROBERTS: Well that's -- but we don't try to solve every case. We look at particular questions presented. And maybe there's going to be another case coming up in which the issue of how broadly you should construe promotion is, or whether you should have a different definition when the offenses are merged

or not. And we'll confront that when it gets here.

It seems to me that your argument is -- maybe your best argument, but your argument, anyway, is let's avoid this question because of these other mistakes that have been made, mistakes which are not presented to us on the question on which we granted cert.

MR. VARE: I think, Mr. Chief Justice, I'm not asking this Court to avoid any question. What I am saying is that there is a profits construction that if you apply the traditional rules of statutory construction, if you look at the text -- the word itself, "proceeds," does not have a single plain meaning as gross receipts. It is ambiguous. And it has multiple shades of meaning depending upon the context.

If you look at the term "proceeds" in context then, then it will depend upon how one is using it. If I were selling a house, and I asked somebody on the street what would be my proceeds from the sale of my house, in that -- and only in that context, some would say it is the gross. Some would say it is the net. Some would say it depends.

Well, it depends upon what? It depends upon context. That is included in the question presented.

JUSTICE GINSBURG: Well, let's take this

context.

There is, if you are going to go with profit, a question of what expenses? That's one of the difficulties of working with a net proceeds, because we don't know what the expenses that you would deduct, and the hit man was given as one example. You said no, not that one. But salaries to the runners, yes.

To figure out what would count to come up with a net figure is the least difficult, is it not?

MR. VARE: Justice Ginsburg, I think that it is slightly more difficult in the case the government has now, which is really no difficulty at all. I think that it would depend upon the unlawful activity, the specified unlawful activity, what would be the ordinary expenses associated with doing that crime.

And lower courts are well equipped and juries are well equipped to hear evidence, direct and circumstantial, and make inferences and decide those issues.

JUSTICE SCALIA: Why does it have to be the ordinary expense of that? I mean, let's assume the charge is murder, and I happen to use a hit man for the murder. That's proven and whatnot.

Why -- you mean, that isn't part of the murder conviction, simply because I could have done it

without a hit man, I could have done it myself?

MR. VARE: No, I don't think so at all, Justice Scalia.

JUSTICE SCALIA: You think paying the hit man would be part of the murder transaction?

MR. VARE: Absolutely.

JUSTICE SCALIA: Uh-huh.

MR. VARE: But I don't think that that necessarily parlays into whether or not it is money laundering or not.

JUSTICE SCALIA: No, I understand.

MR. VARE: If, for example, the murderer paid the hit man with money to kill somebody and then paid -- you know, used proceeds from the insurance premium that somebody might have been his wife or her husband, and used the proceeds to pay off the money -- the hit man for the next crime or to reward him or something else, to carry on the business or used the insurance proceeds to conceal where they came from, then I think you could create a hypothetical situation of money laundering.

CHIEF JUSTICE ROBERTS: I thought it would depend on whether or not the insurance proceeds exceeded how much he had to pay the hit man, right? Let's say he's not doing it to get the insurance money. It just

so happens he had a $50,000 policy on the victim --

JUSTICE SCALIA: He wanted to kill his wife, right?

CHIEF JUSTICE ROBERTS: Yes. He just wanted to commit the murder, not get the money. And so he pays the hit man $100,000, he gets the $50,000, and then uses it for all these other activities, you'd say no money laundering, because no profits?

MR. VARE: If we assume the expansive interpretations of a transaction promoting the underlying crime that have been presented in this case and then we apply the profits definition, that might not be money laundering. But, the money laundering statute is not designed to cure that evil. That evil is punished and punished severely by the murder statute. It is punished as the underlying crime.

And so in this case, Mr. Santos and Mr. Diaz -- or Mr. Santos was punished up to the maximum of five years for running an illegal gambling business. He didn't do anything else other than run a gambling business.

And so I think the point is at the end of the day, there are certainly a lot of hypothetical situations that suggest a profits construction might pose some burdens, might not make sense. But if you're

going to look at the burdens on the government in terms of construing the term "proceeds," then you also must look at the consequences of accepting the gross receipts construction. And I think at the outset, nearly every justice up here suggested -- well, that turns every illegal gambling business into a money laundering violation.

The government has no answer to that. Under their interpretation as applied today, then every illegal gambling operator will be guilty of money laundering.

CHIEF JUSTICE ROBERTS: I thought their answer was the money laundering statute covers a whole waterfront of activities besides illegal gambling. And the question is, what did Congress intend when they passed the money laundering statute.

This is kind of the tail wagging the dog. The tail is, well, it presents these problems when you're talking about gambling operations, but there's a whole rest of the dog area where it doesn't present a problem.

MR. VARE: Well, I think what the money laundering statute was intended to do was punish different conduct, separate and distinct from the underlying crime. And that different conduct is

inherent in conducting a financial transaction with the intent to promote the carrying on of the unlawful activity.

I do not think that you can parse the statutory language and only address the term "proceeds" irrespective of its consequences.

In fact, I think the questions directed to me as to the harsh consequences on the government approving profits shows that you have to look at the term "proceeds" in its context. In its context includes not only the burdens on the one hand, but it certainly includes the situation we have here, that every illegal gambling business is automatic money laundering. And that is not what money laundering statute was enacted, it's not what it was written or intended to address.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Vare.

Mr. Roberts, you have four minutes remaining.

REBUTTAL ARGUMENT OF MATTHEW D. ROBERTS
ON BEHALF OF THE PETITIONER

MR. ROBERTS: Thank you.

If I could first address the reasons why this Court should not decide the separate transaction issue itself in this case.

First of all, it's not the question presented here which is limited to the meaning of the statutory term "proceeds." Respondents didn't present any alternative question in their briefs in opposition. And, in fact, they don't present an alternative question presented even in their briefs on the merits. They're just using the concern about merger as a reason to decide that proceeds means profit.

The separate transaction issue was decided against Respondents adversely on direct appeal in the Febus case, as my brother on the other side acknowledged. And those kinds of issues that are decided adversely on direct appeal shouldn't be relitigated.

The issue wasn't raised in the separate transaction issue, it wasn't raised in the Section 2255 issues, and wasn't addressed by the courts below in these collateral proceedings.

At most, we say it should be left open for another case that presents -- that presents the issue. Beyond that, if this Court thought that something should be left open for the court below to address, the court below could address a range of possible ways to deal with ensuring a separation, for example, Justice Stevens's suggestion that an illegal gambling business

under the statute itself entails the payment of winners and the payment of employees, although we don't think that it does.

But a profits definition is not the way to address concerns about overlap for the underlying offense, because it makes no sense in the broader context of the statute.

It would create significant uncertainty about the scope of the statute because of the absence of accounting rules. It would make proof very difficult as a general matter because of the absence of those rules and because criminals often don't keep accounting records. It would exclude numerous concealment transactions that Congress had no reason not to cover, and it would cripple the government's ability to prosecute professional money launderers, which are really a significant part of the problem that Congress was addressing.

If the Court has no further questions, we would ask that the judgments of the court of appeals be reversed.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon at 12:00 noon, the case in the above-entitled matter was submitted.)

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